IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
August 22, 2017 Session

GREGORY E. POPE v. NEBCO OF CLEVELAND, INC. ET AL.

Appeal from the Workers' Compensation Appeals Board
Court of Workers' Compensation Claims
No. 2015-01-0010 Thomas L. Wyatt, Judge

No. E2017-00254-SC-R3-WC – FILED – JANUARY 16, 2018

The Plaintiff, Gregory E. Pope, filed this action for workers' compensation benefits in the Court of Workers' Compensation Claims ("trial court") against his former employer, Nebco of Cleveland, Inc., d/b/a Toyota of Cleveland ("Toyota" or "the dealership"). In 2014, Mr. Pope suffered a severe knee injury while competing in a "mud run" charity event sponsored by his employer and other local businesses. During trial, Toyota argued that Mr. Pope's injury was not compensable because it arose from his voluntary participation in a non-work-related activity. The trial court determined that Mr. Pope's injury was compensable and awarded him medical benefits. On post-trial motion, the trial court also increased the amount of Mr. Pope's awarded attorney's fees. Toyota appealed to the Workers' Compensation Appeals Board ("Appeals Board"), which reversed on the issue of compensability as well as the accompanying award of attorney's fees. Mr. Pope subsequently appealed to the Tennessee Supreme Court, which referred this case to the Special Workers' Compensation Appeals Panel pursuant to Tennessee Supreme Court Rule 51. In this appeal, Mr. Pope challenges the Appeals Board's determination on the issue of compensability and raises two constitutional challenges to the statutes establishing the Appeals Board. We determine that Mr. Pope's constitutional challenges to the statutes establishing the Appeals Board are without merit. Following our thorough review of the record, we also affirm the Appeals Board's reversal and dismissal of the case on the grounds that Mr. Pope's injury is not compensable.

Tenn. Code Ann. § 50-6-217(a)(2)(B) (2017 Supp.) Appeal as of Right;
Decision of the Workers' Compensation Appeals Board Affirmed

THOMAS R. FRIERSON, II, J., delivered the opinion of the court, in which SHARON G. LEE, J., and DON R. ASH, SR.J., joined.

William J. Brown, Cleveland, Tennessee, for the appellant, Gregory E. Pope.

Jennifer Orr Locklin, Nashville, Tennessee, for the appellees, Nebco of Cleveland, Inc., d/b/a Toyota of Cleveland and Tennessee Automotive Association Self Insurers' Trust.

Herbert H. Slatery III, Attorney General and Reporter; Andrée S. Blumstein, Solicitor General; and Alexander S. Rieger, Deputy Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual and Procedural Background

In or around 2010, Toyota joined various local businesses and organizations in sponsoring the Chattanooga Mud Run, a charity event designed to raise money for the Habitat for Humanity of the Greater Chattanooga Area. Eddie Triplett, then the dealership's general manager and operating partner, testified during trial that Toyota chose to sponsor the mud run because it was "a worthy cause and a growing event," one that would provide the dealership "exposure" and "ground floor opportunities." For example, as a result of its status as a title sponsor, Toyota received a significant amount of publicity, including recognition on television, radio, social media, and through various other promotional materials. At the mud run itself, Toyota displayed vehicles for participants' viewing. The dealership was also allowed to enter up to three teams in the competition at no cost.

An incident occurring during the 2014 mud run prompted this litigation. Initially, the dealership had only one team signed up to compete that year, which consisted of Mr. Triplett's son and his friends. Despite testifying at trial that "[n]obody would notice" if dealership employees did not compete in the mud run, Mr. Triplett acknowledged that he formed his own team because he did not want the dealership's two unclaimed teams "to completely go to waste." Mr. Triplett testified that he was also experiencing pressure from his children to participate and that he thought competing in the event would be fun.

Accordingly, Mr. Triplett approached Dave Mason, then a sales consultant for Toyota, about organizing a team. The parties do not dispute the general nature of that conversation. Essentially, Mr. Triplett told Mr. Mason that he wanted to form a team and also wanted to be one of the participants. After Mr. Mason agreed to join the team, Mr. Triplett put him in charge of finding other participants. Although Mr. Mason did not have any supervisory authority over dealership employees, Mr. Triplett testified that he did understand the effect of "peer pressure." However, Mr. Triplett testified that he never

told Mr. Mason that participation was required or that an employee's refusal to participate would result in adverse employment action.

According to Mr. Mason, he then began recruiting team members by reaching out to individuals that he knew were physically fit. Eventually, Mr. Mason was able to obtain commitments from four individuals, including himself and Mr. Triplett, but a minimum of five participants was required to form a team. At this point, Mr. Mason decided to approach Mr. Pope, the plaintiff in this case and a fellow sales consultant whom Mr. Mason had seen at the gym on numerous occasions.

Mr. Pope testified that the first time Mr. Mason approached him about the mud run, Mr. Pope unequivocally expressed his desire not to participate, stating that he did not want to be away from the dealership on a Saturday, the peak day for sales. Testimony established that sales consultants worked on commission and that the dealership would not compensate employees for time spent at the mud run. Mr. Pope also maintained that as a single parent, he desired to stay at the dealership to make sales and did not want to risk getting hurt. Despite Mr. Pope's initial refusal, Mr. Mason pleaded with Mr. Pope on three or four different occasions to join the team. According to Mr. Mason, Mr. Pope finally agreed to participate after Mr. Mason approached him the third or fourth time and said, "You're basically our last choice and I need you to do it, if you can do it." According to Mr. Pope, he agreed to participate after Mr. Mason said, "Man, I've got you down. You're on the list."

Mr. Pope testified that although he did not believe he would be fired for refusing to participate, he believed that his refusal "would have been a letdown for the team and Eddie [Triplett]." Mr. Pope stated that he did not want his colleagues to remember him as someone who prevented the team from competing[1] and he did not wish to disappoint his boss, Mr. Triplett, whom he viewed as a father figure.

A couple of days before the event, Mr. Triplett led a brief meeting at the dealership to discuss the logistics of the mud run. At this meeting, he distributed "Captain America" t-shirts to the employees who would be participating. The shirts did not contain the company's name, logo, or any other identifying information. Mr. Triplett did not provide any specific instructions regarding work responsibilities at the event. The parties agree that employees were not required to make sales at the event or advertise for Toyota in any way.

[1] It is unclear whether Mr. Pope's refusal to participate would, in fact, have prevented the team from competing. During trial, Mr. Mason speculated that if Mr. Pope had refused to participate, he probably would have questioned Mr. Triplett regarding whether he could ask a non-employee to fill the last spot. However, Mr. Mason did not know if that was an option.

On August 16, 2014, Mr. Pope participated in the mud run. Unfortunately, soon after beginning the course, Mr. Pope was seriously injured. Specifically, Mr. Pope's left quadriceps tendon ruptured after he abruptly stopped to avoid a collision with another athlete, who was attempting to scale an eight-foot wall. Mr. Pope's injury required surgery, which resulted in medical bills totaling $19,293.47. Although Mr. Pope's personal health insurance covered the vast majority of the medical expenses, Mr. Pope ultimately had to pay $565.56 out of pocket. The parties have stipulated that Mr. Pope suffered the injury and incurred resulting medical expenses.

Asserting that his injury arose primarily in the course and scope of his employment, Mr. Pope filed a claim for workers' compensation, which Toyota subsequently denied. After unsuccessful attempts at mediation, the parties participated in a hearing before the trial court, which determined that Mr. Pope's injury was compensable and awarded him medical benefits. On post-trial motion, the court also increased the amount of Mr. Pope's awarded attorney's fees, calculated as a percentage of Mr. Pope's total medical expenses rather than as a percentage of his nominal $500.00 out-of-pocket expenditures. Toyota appealed to the Appeals Board, which reversed the trial court on the issue of compensability as well as the accompanying award of attorney's fees. This appeal by Mr. Pope followed.[2]

II. Issues Presented

Mr. Pope presents the following issues for our review, which we have restated slightly:

1. Whether Tennessee Code Annotated sections 50-6-217 and -218, the statutes establishing the Appeals Board, facially violate article II and article VI of the Tennessee Constitution.

2. Whether the Appeals Board erred in determining that Toyota carried its burden of disproving that Mr. Pope's participation in the mud run was impliedly required and work related under Tennessee Code Annotated section 50-6-110(a)(6)(A), (C).

3. Whether the Appeals Board erred by denying an award of attorney's fees to Mr. Pope.

[2] Toyota has objected to the sufficiency of Mr. Pope's Statement of Facts under Tennessee Rule of Appellate Procedure 27(a)(6). Although not every sentence in Mr. Pope's Statement of Facts contains an "appropriate reference[] to the record," Toyota does not ask this Panel to dismiss the appeal on this ground, and we decline to do so.

III. Standard of Review

We review de novo the factual findings of the Court of Workers' Compensation Claims. *See* Tenn. Code Ann. § 50-6-225(a)(2) (2014 & Supp. 2017); *see also Willis v. All Staff*, No. M2016-01143-SC-R3-WC, 2017 WL 3311318, at *3 (Tenn. Workers' Comp. Panel Aug. 3, 2017). Although we presume the correctness of findings of fact, that presumption can be rebutted if the preponderance of the evidence is otherwise. *See id.* "The interpretation and application of Tennessee's Workers' Compensation Law are questions of law that are reviewed de novo with no presumption of correctness." *Mansell v. Bridgestone Firestone N. Am. Tire, LLC*, 417 S.W.3d 393, 399 (Tenn. 2013) (citing *Nichols v. Jack Cooper Transp. Co.*, 318 S.W.3d 354, 359 (Tenn. 2010)). We acknowledge our duty to construe the workers' compensation statutes "fairly, impartially, and in accordance with basic principles of statutory construction . . . ." Tenn. Code Ann. § 50-6-116 (2014). We are also mindful of our obligation to avoid construing these statutes "remedially or liberally . . . [or] in a manner favoring either the employee or the employer." *Id.*

This appeal also includes two constitutional challenges to the statutes creating the Workers' Compensation Appeals Board. Because constitutional issues are inherently questions of law, our review of those issues is de novo. *See State v. Robinson*, 29 S.W.3d 476, 480 (Tenn. 2000) ("As the constitutionality of a statute is a question of law, our review is de novo without a presumption of correctness given to the lower courts' judgments."). Furthermore, Tennessee courts generally presume the constitutionality of statutes enacted by the legislature, especially in the context of workers' compensation. *See Mansell*, 417 S.W.3d at 404 ("[T]his Court has consistently rejected challenges to the workers' compensation scheme based upon the separation of powers provisions of the Tennessee Constitution."); *see also Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003) ("In evaluating the constitutionality of a statute, we begin with the presumption that an act of the General Assembly is constitutional.").

IV. Constitutional Challenge

Mr. Pope raises two constitutional challenges to the statutes establishing the Appeals Board. Toyota responds to both constitutional attacks by citing and incorporating by reference the arguments set forth by the State, which intervened in this case to defend the constitutionality of the challenged statutes. We will address each constitutional challenge in turn.

A. Waiver

We must first address the issue raised by the State regarding whether Mr. Pope has waived his right to challenge the constitutionality of the statutes establishing the Appeals Board by failing to raise his constitutional arguments in the proceedings below. The State recites the general rule that "questions not raised in the trial court will not be entertained on appeal." *See City of Cookeville ex rel. Cookeville Reg'l Med. Ctr. v. Humphrey*, 126 S.W.3d 897, 905–06 (Tenn. 2004). The State also observes that this waiver rule applies with equal force to constitutional challenges. *See, e.g.*, *In re M.L.P.*, 281 S.W.3d 387, 394 (Tenn. 2009) (holding that a party waived his constitutional challenge to Tenn. Code Ann. § 37-2-403 (2005 & Supp. 2008) because he failed to properly raise the issue before the trial court). Finally, the State asserts that Mr. Pope failed to comply with the procedural requirement to timely notify the State of his intent to challenge the constitutionality of the statutes at issue in this case. *See* Tenn. Code Ann. § 29-14-107(b) (2012); Tenn. R. Civ. P. 24.04; Tenn. R. App. P. 32.

Mr. Pope, on the other hand, argues that the Appeals Board "does not have either statutory authority or constitutional authority to address the facial constitutionality of its own existence." Consequently, Mr. Pope argues that raising any constitutional issues before the Court of Workers' Compensation Claims or the Appeals Board would have been futile. Therefore, according to Mr. Pope, he has not waived his right to bring constitutional challenges to the statutes establishing the Appeals Board because this appeal presents his first opportunity to raise those issues before an article VI court.

We agree with Mr. Pope on this issue. In *Richardson v. Board of Dentistry*, 913 S.W.2d 446 (Tenn. 1995), the Tennessee Supreme Court comprehensively addressed the question of when it is appropriate for an administrative tribunal to decide constitutional issues. According to the Court, the answer to that question "depends on the nature of the constitutional issue." *Id.* at 454. The Court proceeded to identify three types of constitutional challenges: (1) challenges to "the facial constitutionality of a statute authorizing an agency to act," (2) challenges to "the actions of an agency in applying a rule or statute," and (3) challenges to "the constitutionality of the procedures employed by the agency." *Id.* Ultimately, the Court concluded that administrative tribunals may only decide the second and third types of constitutional challenges but not the first type; the Court clearly held that administrative tribunals "have no authority to determine the facial constitutionality of a statute." *Id.* at 455.

More importantly for present purposes, the *Richardson* Court also held that a party does not waive his right to attack the facial constitutionality of a statute before an article VI court by failing to raise the issue before an administrative tribunal. *Id.* at 456 (discerning "no good reason to require that parties raise facial constitutional challenges before agencies which lack the power to resolve the issue" because "[t]he law should not require one to perform useless and futile acts"). To avoid any ambiguity, the Court

stated: "The party may seek judicial review of the resolved issues and of those issues that the agency refused *or was without authority to consider*. In either circumstance, the party may challenge the constitutionality of a statute *regardless of whether it was raised at the agency level*." *Id.* at 456–57 (emphasis added).

As Mr. Pope correctly observes, the Tennessee Supreme Court recently applied this principle in *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 845 (Tenn. 2008), holding that Tennessee Code Annotated "section 4-5-225 does not preclude the Chancery Court from considering a constitutional challenge to the facial validity of a statute even when the agency has not considered a declaratory order." Therefore, Tennessee case law expressly refutes the State's argument that Mr. Pope waived his ability to challenge the constitutionality of Tennessee Code Annotated sections 50-6-217 and -218 by failing to raise the issue of constitutionality before the Appeals Board.

The State also contends that Mr. Pope waived his ability to challenge the constitutionality of the statutes establishing the Appeals Board by failing to notify the Attorney General prior to this appeal of his intent to bring those constitutional challenges. Tennessee Rule of Appellate Procedure 32 requires a party raising a constitutional issue to "serve a copy of the party's brief on the Attorney General." Tenn. R. App. P. 32; *see also* Tenn. R. Civ. P. 24.04. Mr. Pope complied with this requirement by serving a copy of his appellate brief on the Attorney General on March 30, 2017. Although the State complains that it did not receive notice of the constitutional challenge prior to this appeal, the governing rule only requires a party to put the State on notice of its constitutional challenge "[w]hen the validity of a statute . . . is drawn in question . . . ." Tenn. R. App. P. 32(a). Here, the constitutional validity of the statutes creating the Appeals Board was not "drawn in question" until Mr. Pope had the opportunity to present his constitutional challenge before an article VI court. Accordingly, Mr. Pope satisfied the notice requirement. Inasmuch as Mr. Pope has not waived his right to bring these constitutional challenges, we now turn to the merits of his arguments.

B. Separation of Powers

Mr. Pope first argues that the statutes creating the Workers' Compensation Appeals Board facially violate the separation of powers required by article II of the Tennessee Constitution. He acknowledges that in *Plasti-Line v. Tennessee Human Rights Commission*, 746 S.W.2d 691 (Tenn. 1988), our Supreme Court held that executive tribunals charged with administering and enforcing public policy could constitutionally exercise quasi-judicial power. Specifically, the Court upheld the constitutionality of the statutes creating the Tennessee Human Rights Commission, which is tasked with enforcing anti-discrimination laws in employment, housing, and public accommodations. *Id.* at 693–94. Nevertheless, Mr. Pope argues that *Plasti-Line* is distinguishable from the

present case on the basis that the Tennessee Human Rights Commission, unlike the Appeals Board, lacks the power of appellate review, which Mr. Pope describes as a quintessential "judicial power."

The State reminds this Panel that Tennessee courts have historically granted much deference to the legislature in regulating workers' compensation. *See Mansell*, 417 S.W.3d at 404 ("[T]his Court has consistently rejected challenges to the workers' compensation scheme based upon the separation of powers provisions of the Tennessee Constitution."). The State also asserts that the statutes creating the Appeals Board "do nothing to interfere with the authority of the judiciary" and that "they merely provide an administrative review process." Upon thorough review, we conclude that Mr. Pope's separation-of-powers argument is unavailing.

Article II, section 1 of the Tennessee Constitution provides for the distribution of state power across "three distinct departments: the legislative, executive, and judicial." Traditionally, "[t]he legislative branch has the authority to make, alter, and repeal the law; the executive branch administers and enforces the law; and the judicial branch has the authority to interpret and apply the law." *Richardson*, 913 S.W.2d at 453.

Article II, section 2 of the Tennessee Constitution clarifies that "[n]o person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases . . . directed or permitted [by the Tennessee Constitution]." As a practical matter, however, Tennessee courts have long recognized that "it is impossible to preserve perfectly the theoretical lines of demarcation between the executive, legislative, and judicial branches of government. There is necessarily a certain amount of overlapping." *Lynch v. City of Jellico*, 205 S.W.3d 384, 393 (Tenn. 2006) (quoting *Underwood v. State*, 529 S.W.2d 45, 47 (Tenn. 1975) (internal quotation marks omitted)). Therefore, when considering whether the legislature has encroached upon the province of the judiciary, courts will generally uphold the constitutionality of laws that do not "frustrate or interfere with the adjudicative function of the courts . . . ." *Id.* (quoting *Underwood*, 529 S.W.2d at 47 (internal quotation marks omitted)).

Mr. Pope asserts that only the Tennessee Supreme Court, intermediate appellate courts, and other inferior courts organized under article VI of the Tennessee Constitution have the constitutional authority to exercise appellate review over an agency's initial findings of fact and conclusions of law. In support of his position, Mr. Pope relies on *Lynch*, wherein our Supreme Court upheld the constitutionality of a statute requiring parties to a workers' compensation claim to participate in a "benefit review conference" before bringing a claim in circuit or chancery court. *See id.* at 388. Because the Court in *Lynch* stressed that "[t]he courts will ultimately adjudicate a workers' compensation

claim if the case is not settled at the benefit review conference," *id.* at 393, Mr. Pope argues that interference with the adjudicative function of the courts occurs when a party lacks the right to appeal his or her claim to an article VI court.

We determine Mr. Pope's reliance on *Lynch* to be misplaced. The Court in *Lynch* explicitly rejected a separation-of-powers challenge to a statute requiring an additional level of administrative review, which is precisely what the Appeals Board provides in workers' compensation cases. *See id.* Moreover, the statutory scheme creating the Appeals Board does not foreclose ultimate judicial resolution of workers' compensation cases but expressly preserves the opportunity for judicial review. *See* Tenn. Code Ann. § 50-6-225(a) (permitting a direct appeal to the Tennessee Supreme Court from an adverse decision of the Court of Workers' Compensation Claims); *id.* § 50-6-217(a)(2)(B) (permitting a direct appeal to the Tennessee Supreme Court from an adverse decision of the Appeals Board).

The State correctly observes that "administrative appeals, whether by a board or a commissioner's designee, are not novel." In some instances, a statute specifically authorizes administrative appeals. *See, e.g., id.* § 50-7-304(c) (Supp. 2017) (providing for an administrative appeal of an agency's unemployment decision). In other instances, internal agency rules permit some form of administrative review. *See, e.g.*, *Settle v. Tenn. Dep't of Corr.*, 276 S.W.3d 420, 426 (Tenn. Ct. App. 2008) (addressing the Tennessee Department of Correction's internal policy of administrative review in inmate-segregation decisions).

In fact, some statutes require parties to pursue administrative appeals before bringing a claim in an article VI court. *See, e.g.*, *Pickard v. Tenn. Water Quality Control Bd.*, 424 S.W.3d 511, 514 (Tenn. 2013) (holding that Tenn. Code Ann. § 69-3-105(i) (2012) requires administrative appeal to the Water Quality Control Board when challenging the Tennessee Department of Environment and Conservation's decision to issue a discharge permit); *Barret v. Olsen*, 656 S.W.2d 373, 375 (Tenn. 1983) (holding that Tenn. Code Ann. § 30-1620 (1982) requires administrative appeal to the State Board of Equalization after adverse tax treatment by the Tennessee Department of Revenue). This requirement is known as the exhaustion doctrine. As our Supreme Court has explained:

> [T]he exhaustion doctrine serves several goals. First, it allows an administrative agency to function efficiently and to correct its own errors. Second, it "allows the agency to develop a more complete administrative record upon which the court can make its review." Third, the doctrine allows agencies to take full advantage of their particular expertise in specialized fact-finding, the interpretation of contested technical subject matter, and disputes over the agency's regulations.

Bailey v. Blount Cty. Bd. of Educ., 303 S.W.3d 216, 236 (Tenn. 2010) (internal citations omitted).

Although Tennessee's workers' compensation statutory scheme requires one level of administrative review—litigation in the Court of Workers' Compensation Claims—it does not require exhaustion of administrative appeals. *See* Tenn. Code Ann. § 50-6-225(a) (permitting a direct appeal to the Tennessee Supreme Court from an adverse decision of the Court of Workers' Compensation Claims). Nevertheless, the longstanding doctrine of mandatory exhaustion of administrative appeals in other legal contexts weighs heavily against Mr. Pope's contention that administrative appellate review inherently violates the separation of powers. Mr. Pope has not presented, and we have not found, any decisions in which our courts have sustained a separation-of-powers challenge to statutes requiring or merely permitting administrative appeals.

Finally, at least two courts in other jurisdictions have specifically upheld the constitutionality of administrative appellate review in the context of workers' compensation.[3] In 1983, the United States Court of Appeals for the D.C. Circuit considered a multi-faceted constitutional attack on the Benefits Review Board, the entity that considers administrative appeals in federal workers' compensation cases. *See Kalaris v. Donovan*, 697 F.2d 376 (D.C. Cir. 1983). Because the D.C. Circuit Court determined that the Board's exercise of appellate review was "simply an additional layer of administrative review" and not an unconstitutional exercise of judicial power, the court found that the two-tiered "organizational scheme" of the federal workers' compensation system did not violate the separation of powers required by the United States Constitution. *Id.* at 399–400. More recently, the Alaska Supreme Court rejected a separation-of-powers challenge to the statutes creating that state's Workers'

[3] We acknowledge that federal court decisions and decisions from other state courts are merely persuasive authority and not binding on this Panel. *See Gossett v. Tractor Supply Co.*, 320 S.W.3d 777, 785 n.3 (Tenn. 2010) (noting that opinions of federal intermediate courts are "only persuasive authority and not binding" on Tennessee state courts); *Ottinger v. Stooksbury*, 206 S.W.3d 73, 78 (Tenn. Ct. App. 2006) (noting that decisions of other state appellate courts may be considered persuasive authority by Tennessee state courts).

Compensation Appeals Commission. *See Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27, 34 (Alaska 2007). In doing so, the Alaska Supreme Court comprehensively and convincingly described the "quasi-judicial" nature of Alaska's Appeals Commission and emphasized the continued availability for post-administrative judicial review. *Id.* at 34–40.

In light of Tennessee case law interpreting article II of the Tennessee Constitution, the longstanding tradition of administrative exhaustion, and the persuasive authority of other jurisdictions that have considered the constitutionality of workers' compensation appeals boards, we conclude that the challenged statutes do not violate the separation of powers required by article II of the Tennessee Constitution. The appellate review exercised by the Appeals Board primarily serves an intra-agency purpose—ensuring that initial agency decisions comply with law and procedure and are supported by substantial evidence. *See* Tenn. Code Ann. § 50-6-217(a)(3). This function does not "frustrate or interfere with the adjudicative function of the courts." *See Lynch*, 205 S.W.3d at 393. Although an additional level of administrative review might delay resolution of a conflict by an article VI court, Tennessee's workers' compensation statutory scheme still provides two avenues for judicial review. We again emphasize that a party aggrieved by a decision of the Court of Workers' Compensation Claims may still appeal directly to the Tennessee Supreme Court rather than filing an appeal with the Appeals Board. *See* Tenn. Code Ann. § 50-6-225(a)(1).[4] For the foregoing reasons, Mr. Pope's separation-of-powers argument is unavailing.

C. Article VI Appointment, Removal, and Control

Mr. Pope also argues that the statutes creating the Appeals Board violate article VI of the Tennessee Constitution "in the manner of appointment of the board, removal of board members[,] and the Executive Department's control of the board." The parties do not dispute that Tennessee Code Annotated sections 50-6-217 and -218 provide for executive control of the Appeals Board and outline appointment and removal procedures that differ from those provided for state court judges in article VI. However, both Toyota and the State argue that the appointment and removal procedures of article VI are not controlling because the Appeals Board judges are neither "intermediate appellate court" judges within the meaning of section 3 nor "inferior court" judges within the meaning of

[4] During oral arguments, counsel for Mr. Pope asserted that Tennessee's cap on attorney's fees in workers' compensation cases makes administrative and judicial appeals cost-prohibitive. He raised the concern that such a policy might violate the Open Courts Clause of the Tennessee Constitution. However, because Mr. Pope did not raise this issue in the statement of issues on appeal in his brief, we deem the issue waived and decline to address it. *See Forbess v. Forbess*, 370 S.W.3d 347, 356 (Tenn. Ct. App. 2011) (finding an issue waived because the party did not include the issue in his brief's statement of issues).

section 4. Rather, they contend that the Appeals Board judges are executive-branch officials and, therefore, not bound by the requirements of article VI. Upon review, we agree with Toyota and the State that article VI does not govern the appointment or removal of executive branch officials.

Article VI, section 3 of the Tennessee Constitution provides in pertinent part:

> Judges of the Supreme Court or any intermediate appellate court shall be appointed for a full term or to fill a vacancy by and at the discretion of the governor; shall be confirmed by the Legislature; and thereafter, shall be elected in a retention election by the qualified voters of the state.

Tenn. Const. art. VI, § 3. On the other hand, article VI, section 4 provides:

> The Judges of the Circuit and Chancery Courts, and of other inferior Courts, shall be elected by the qualified voters of the district or circuit to which they are to be assigned. Every Judge of such Courts shall be thirty years of age, and shall before his election, have been a resident of the State for five years and of the circuit or district one year. His term of service shall be eight years.

Tenn. Const. art. VI, § 4.

Tennessee Code Annotated section 50-6-218 (Supp. 2017) governs the manner of appointment and removal of Appeals Board judges, affording the governor the power of appointment. To be eligible for appointment, an individual must be at least thirty years old, have at least seven years of experience in workers' compensation, and be licensed to practice law in Tennessee. *See* Tenn. Code Ann. § 50-6-218(1). Appeals Board judges may serve a maximum of two six-year terms, which are renewable at the discretion of the governor. *See id.* § 50-6-218(2). The governor also has the authority to remove these judges for any violation of the judicial offenses provided in Tennessee Code Annotated section 17-5-302. *See id.* § 50-6-218(3).

Mr. Pope argues that Tennessee Code Annotated section 50-6-218 violates article VI, whether analyzed under either section 3 or section 4, because Appeals Board judges are not subject to any type of election. He asserts that "the requirement of a retention election or an election of some sort is inherent to either of the constitutional provisions." Mr. Pope also points to other purported inconsistencies between Tennessee Code Annotated section 50-6-218 and article VI, such as the length of the Appeals Board judges' term, the minimum age of the judges, and the extent of executive control.

We determine that article VI does not prohibit the legislature from enacting laws providing for a different manner of appointment, removal, and level of executive control over administrative tribunals. In *Plasti-Line*, our Supreme Court upheld the constitutionality of the statutes establishing the Tennessee Human Rights Commission even though the commissioners were not appointed according to article VI procedures. *See Plasti-Line*, 746 S.W.2d at 694. Our Supreme Court expressly rejected the contention "that commission members, administrative judges or other personnel enforcing the statutory provisions must possess the qualifications of and must be selected in the manner provided for state judges." *Id.* Determining *Plasti-Line* to be controlling in the present case, we conclude that Mr. Pope's constitutional challenge based on article VI must fail.

In summary, we conclude that Mr. Pope's challenges to the constitutionality of the statutes establishing the Workers' Compensation Appeals Board are without merit. We will now proceed to address Mr. Pope's substantive claim for workers' compensation benefits.

V. Compensability of Injury

Mr. Pope asserts that the Appeals Board erred by reversing the trial court's ruling that his injury was compensable. Mr. Pope also asserts that Toyota failed to carry its burden of establishing an affirmative defense under Tennessee Code Annotated section 50-6-110(a)(6) (Supp. 2017) because it failed to prove that Mr. Pope's participation in the mud run was not "impliedly required" under subsection (a)(6)(A) and was not a "work-related dut[y]" under subsection (a)(6)(C). Toyota argues that the trial court erred by mischaracterizing Toyota's burden of proof and by finding that Mr. Pope's participation in the mud run was impliedly required and work related. Following a thorough review of the record and applicable law, we conclude that the trial court accurately determined the parties' respective burdens of proof but incorrectly concluded that Mr. Pope's participation in the mud run was "impliedly required" and "work related" as a matter of law. We therefore agree with the Appeals Board's analysis of this issue.

A. Statutory Background

As a general matter, in order for an injured worker to receive workers' compensation benefits, he or she must prove that the injury occurred "by accident" and "ar[ose] primarily out of and in the course and scope of his employment without regard to fault as a cause of the injury . . . ." Tenn. Code Ann. § 50-6-103(a) (2014); *see Kilburn v. Granite State Ins. Co.*, 522 S.W.3d 384, 389 (Tenn. 2017) ("It is well settled in Tennessee that a plaintiff in a workers' compensation suit has the burden of proving

every element of the case by a preponderance of the evidence." (quoting *Elmore v. Travelers Ins. Co.*, 824 S.W.2d 541, 543 (Tenn. 1992))).

Additionally, Tennessee Code Annotated section 50-6-110(a) categorically excludes several types of injuries from compensability. Specifically, an injured worker may not receive benefits when the injury arises from his or her own willful misconduct, self-harm, intoxication or illegal drug use, or willful failure or refusal to use a safety device or to perform a duty required by law. Finally, and for present purposes most significantly, subsection (a)(6) also forbids compensation for injuries caused by

> [t]he employee's voluntary participation in recreational, social, athletic or exercise activities, including but not limited to, athletic events, competitions, parties, picnics, or exercise programs, whether or not the employer pays some or all of the costs of the activities unless:
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> A. Participation was expressly or impliedly required by the employer;
>
> B. Participation produced a direct benefit to the employer beyond improvement in employee health and morale;
>
> C. Participation was during employee's work hours and was part of the employee's work-related duties; or
>
> D. The injury occurred due to an unsafe condition during voluntary participation using facilities designated by, furnished by or maintained by the employer on or off the employer's premises and the employer had actual knowledge of the unsafe condition and failed to curtail the activity or program or cure the unsafe condition.

Tenn. Code Ann. § 50-6-110(a). Subsection (b) of the statute provides: "If the employer defends on the ground that the injury arose in any or all of the ways stated in subsection (a), the burden of proof shall be on the employer to establish the defense." *Id.* § 50-6-110(b).

The parties do not dispute that the mud run constitutes a "recreational" and "athletic" event within the meaning of Tennessee Code Annotated section 50-6-110(a)(6). However, Mr. Pope disputes that his participation was "voluntary," as required by section -110(a)(6), because he did not want to participate and never volunteered to participate. Mr. Pope appears to conflate the issue of "voluntariness" with

the issue of whether the participation was "impliedly required" by Toyota. The two issues are analytically distinct. Mr. Pope's participation in the mud run was, in fact, voluntary, because he ultimately chose to participate; the circumstances motivating his decision to participate are irrelevant at this preliminary stage in the analysis. We therefore conclude that Tennessee Code Annotated section 50-6-110(a)(6) is applicable in this matter.

B. Burden of Proof

Having established the relevance of subsection (a)(6) based on Mr. Pope's voluntary participation in the mud run, we must determine which party maintained the burden of proving any or all of the exceptions listed in (A) through (D). Toyota contends that Mr. Pope has the burden of identifying the relevance and proving the applicability of these exceptions. Toyota also suggests that once Mr. Pope identifies the relevant exceptions, Toyota only has to disprove the applicability of one of them in order to successfully assert its affirmative defense. By contrast, Mr. Pope argues, and the trial court held, that Toyota has the burden of disproving the existence of all four exceptions. We agree with Mr. Pope and the trial court that subsection (b) places the burden on Toyota to establish the entirety of its defense under subsection (a) and that subsection (a)(6) does not contemplate a burden-shifting framework.

We begin by observing that since the passage of Tennessee Code Annotated section 50-6-110(a)(6) in 2009, there has been no occasion for a Tennessee court to address the precise statutory interpretation questions raised in this appeal. Nevertheless, we are guided by the general principle that workers' compensation statutes "shall not be remedially or liberally construed but shall be construed fairly, impartially, and in accordance with basic principles of statutory construction and . . . shall not be construed in a manner favoring either the employee or the employer." *See* Tenn. Code Ann. § 50-6-116. Under the "basic principles of statutory construction," Tennessee courts first consider the "plain meaning" of a statute. *Colonial Pipeline*, 263 S.W.3d at 836. Only when a statute is ambiguous do our courts consider other factors, such as "the broader statutory scheme, the history of the legislation, or other sources." *Id.*

We determine that Tennessee Code Annotated section 50-6-110(b) unambiguously places the burden on the employer to establish the entirety of whichever defense it asserts under subsection (a). *See* Tenn. Code Ann. § 50-6-110(b) ("If the employer defends on the ground that the injury arose in any or all of the ways stated in subsection (a), the burden of proof shall be on the employer to establish the defense."). Because subsection (a)(6) is inclusive of the exceptions listed in (A) through (D), Toyota must prove that the exceptions to subsection (a)(6) do not apply in order to assert that the injury "arose . . . in the way stated in [subsection (a)(6)]." The legislature could have created a

burden-shifting framework by removing these exceptions from subsection (a)(6) and by explicitly requiring the injured worker to prove the applicability of one or more exceptions; however, a plain-language reading does not permit such an interpretation, and we decline to read a burden-shifting framework into the statute where none exists.

We also agree with Mr. Pope and the trial court that Toyota must disprove the applicability of all four exceptions to subsection (a)(6) rather than just one. This too can be deduced from the statute's plain meaning. Subsection (a)(6) prohibits recovery of workers' compensation benefits for injuries sustained during voluntary participation in athletic events "unless" certain exceptions apply. Those exceptions, listed in (A) through (D), are presented as a series separated by semi-colons. The word "or" appears before the last exception listed in (D). We agree with the trial court that, "the word 'or,' as used in a statute is a disjunctive article indicating that the various members of the sentence are to be taken separately." *See Leab v. S & H Mining Co.*, 76 S.W.3d 344, 349 (Tenn. 2002) (internal citation omitted). As such, an injury sustained during the course of one's voluntary participation in an athletic event is compensable if any one of the exceptions, taken separately, is applicable. Therefore, as the statute is written, the employer must disprove the applicability of all four exceptions in order to successfully "establish the defense."

C. Impliedly Required

Having established that Toyota must disprove the applicability of all four exceptions to subsection (a)(6), we now turn to Mr. Pope's assertion that the trial court correctly found that Toyota failed to show that participation in the mud run was not "impliedly required" under subsection (a)(6)(A). In drawing this legal conclusion, the trial court emphasized in its compensation order Mr. Mason's repeated pressure on Mr. Pope to participate (despite his repeated refusals) as well as Mr. Mason's statement that Mr. Pope was "on the list" because he was the "last choice." The court also considered what it found to be Mr. Triplett's "very credible testimony that he instilled teamwork and loyalty in his employees and awarded those employees who participated in activities beyond one's assigned duties." Finally, the court highlighted Mr. Triplett's testimony that he understood the impact of "'peer pressure' imposed by the fact he personally supported the Mud Run and would participate on the team."

Toyota concedes that Mr. Triplett asked Mr. Mason to organize the team and that Mr. Mason repeatedly approached Mr. Pope about participating. However, Toyota asks us to affirm the Appeals Board's decision that such facts are insufficient as a matter of law to support a finding that participation in the mud run was "impliedly required." Both Toyota and the Appeals Board emphasize that Mr. Mason, charged with assembling the team, was merely a co-worker of Mr. Pope's and had no supervisory authority over him.

Moreover, neither Mr. Triplett nor Mr. Mason threatened any adverse employment action against employees who declined to participate. To the contrary, Mr. Triplett testified that he viewed the mud run as "definitely voluntary" and not work related. In fact, testimony revealed that Mr. Triplett did not even know which employees Mr. Mason attempted to recruit. Even Mr. Pope testified that he did not believe he would be fired for refusing to participate; he simply did not want to be a "letdown for the team and Eddie [Triplett]," whom he viewed as a "father figure."

In our view, the evidence in the record does not preponderate against the trial court's aforementioned findings of fact. However, as a matter of law, we agree with the Appeals Board that these facts do not lead to the legal conclusion that Mr. Pope's participation in the mud run was "impliedly required" under Tennessee Code Annotated section 50-6-110(a)(6)(A).

Before the enactment of Tennessee Code Annotated section 50-6-110(a)(6)(A) in 2009, this Panel applied a three-pronged test (commonly known as the "Larson test") for determining whether recreational or social activities fall within the course of employment. *See Tucker v. Acme Boot Co.*, 856 S.W.2d 703, 705 (Tenn. Workers' Comp. Panel 1993); *Cameron v. Fireman's Fund Ins. Co.*, No. E1998-00678-WC-R3-CV, 2000 WL 1843399, at *3 (Tenn. Workers' Comp. Panel Dec. 15, 2000); *Segars v. Liberty Mut. Ins. Co.*, No. 03501-9508-CV-00095, 1996 WL 164453, at *2 (Tenn. Workers' Comp. Panel Apr. 9, 1996). Under the Larson test:

> Recreational or social activities are within the course of employment when
>
> (1) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or
>
> (2) The employer, by *expressly or impliedly requiring participation*, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
>
> (3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.

Tucker, 856 S.W.2d at 705 (quoting Arthur Larson, *The Law of Workmen's Compensation* § 22 (1952)) (emphasis added). In *Young v. Taylor-White, LLC*, our Supreme Court declined to adopt the Larson test "as a rule for resolving all cases

involving recreational injuries." *Young v. Taylor-White, LLC*, 181 S.W.3d 324, 329 (Tenn. 2005), *abrogated on other grounds by Gooden v. Coors Tech. Ceramic Co.*, 236 S.W.3d 151 (Tenn. 2007). Nevertheless, the *Young* Court emphasized the importance of determining whether an employee's participation in a recreational activity was "voluntary or impliedly required." *See id.* Although our Supreme Court subsequently clarified that voluntariness is only one factor but not the "touchstone," of determining whether an activity was within the course of employment, s*ee Gooden*, 236 S.W.3d at 156, voluntariness remains a significant consideration in this type of analysis.

In 2009, when the General Assembly codified the circumstances under which recreational and social activities would fall within the course of employment in Tennessee Code Annotated section 50-6-110(a)(6)(A), the Larson test became less consequential. Nevertheless, because the statute contains some language that is identical to that of the Larson test and because our Supreme Court has not disturbed prior rulings that have relied upon the test, we find those cases instructive to the extent that they interpret and apply the phrase "impliedly required."

For example, in *Tucker*, the plaintiff was injured while playing in an off-site softball game organized by one of the plaintiff's co-workers. *See Tucker*, 856 S.W.2d at 704. Although the employer was not an official sponsor of the specific team, it had "a history of sponsoring golf teams, basketball teams and softball teams as part of its involvement and participation in community activities." *Id.* To encourage participation in this softball team, the employer paid for various fees that allowed the team to compete and awarded "aerobic bucks" to employees who participated. *Id.* The employer also provided sporting equipment, such as softballs, bats, and jerseys bearing the company's trademark. *Id.* Applying the Larson test, the Panel held that the plaintiff was neither expressly nor impliedly required to participate in the softball game within the course of his employment. *See id.* at 705.

In *Segars*, an employee was injured while playing volleyball at a company picnic. *See Segars*, 1996 WL 164453, at *1–2. There was a "sharp conflict of evidence" regarding whether the plaintiff was "expressly or impliedly required to attend the event and participate in the activity." *Id.* at *2. According to the plaintiff, "he felt obligated to attend because his supervisor . . . told him he expected to see all of his group of employees at the picnic; that this statement was made to him directly and to other employees who were present with him; that he learned of another employee who was later told the same thing." *Id.* at *1. The plaintiff further testified that while at the picnic, his supervisor repeatedly asked him to play volleyball and, despite the plaintiff's persistent refusals, eventually concluded with a forceful, "We need you." *Id.* On the other hand, the plaintiff's supervisor flatly denied the accusation that he pressured the plaintiff to attend the picnic and to play volleyball. *See id.* at *2. Ultimately, the trial

court resolved this conflict of evidence in the plaintiff's favor, concluding that the plaintiff was required to participate in the volleyball game because he was "made to understand that he was to participate in that game . . . ." *Id.* The Special Worker's Compensation Appeals Panel affirmed the trial court's judgment, concluding that the evidence did not preponderate against the trial court's findings on the issue of compensability. *See id.* at *3.

In *Cameron*, the plaintiff was injured in the parking area at a NASCAR race, which she was able to attend after receiving two free tickets from her employer. *See Cameron*, 2000 WL 1843399, at *1. There was conflicting testimony as to whether the employer required employees to attend these employer-sponsored races. *See id.* at *1–3. Although the plaintiff testified that her supervisor specifically required her attendance, virtually all other witnesses testified that employees could choose to either work or attend the races. *See id.* at *4. After weighing the evidence, the trial court determined that the opportunity to attend the race was "a fringe benefit that was not compulsory. . . ." *Id.* at *3. Referencing the Larson test, the Special Workers' Compensation Appeals Panel affirmed this determination of the trial court. *See id.* at *4.

Finally, in *Young*, the plaintiff was injured at a company-sponsored picnic while participating in a three-legged race. *See Young*, 181 S.W.3d at 326. Although the plaintiff conceded that she was not required to attend the picnic and would not suffer any adverse employment actions for failing to attend, she felt compelled to participate in the three-legged race because the disc jockey "kept insisting" that she participate. *Id.* at 327. The plaintiff also decided to participate because the winner was promised a fifty-dollar cash prize. *Id.* The trial court determined that the plaintiff's injury was compensable because her participation in the three-legged race was impliedly required. *Id.* To support this determination, the trial court relied on the "verbal inducement" of the disc jockey and the employer's promise of a cash prize. *Id.* However, our Supreme Court reversed. *See id.* at 330. Although the Court determined that "[t]he trial court and the parties correctly identified the issue . . . as whether [Employee's] participation in [a recreational activity] was . . . impliedly required[,]" the Court disagreed that the facts alleged supported the trial court's legal conclusion. *Id.* at 329. Specifically, the Court held that "neither mere encouragement [by a disc jockey] nor the offer of a nominal cash prize [by an employer] is enough to transform what would otherwise be a voluntary activity into one within the course of employment." *Id.*

The various outcomes of the foregoing cases illustrate the fact-specific nature of determining whether a recreational or social activity is impliedly required by the employer. Although our courts have not always precisely explained the weight and relevance of the facts considered, we nevertheless deduce at least four general principles from our prior case law that are applicable to the present case. By identifying the

relevance of these general principles, we do not establish a rigid "test" for determining whether a recreational activity is impliedly required by an employer. Instead, we readily acknowledge that the following list of factors is not exhaustive and that the determination of which activities are impliedly required will remain fact-specific.

First, it is important to consider the relationship between the employee and the person who pressured the employee to participate in the activity. For example, in both *Segars* and *Cameron*, the plaintiffs alleged that their supervisors directly exerted the pressure to participate in the injury-causing activities. *See Cameron*, 2000 WL 1843399, at *1–2; *Segars*, 1996 WL 164453, at *1–2. In *Segars*, the court determined that the activity was impliedly required by the employer. *Id.* at *3. In *Cameron*, the court did not find the plaintiff's testimony credible and found in favor of the employer. *See Cameron*, 2000 WL 1843399, at *3. By contrast, in both *Young* and *Tucker*, someone other than a supervisor (a disc jockey and a co-worker, respectively) encouraged the plaintiffs to participate in injury-causing activities. *See Young*, 181 S.W.3d at 329; *Tucker*, 856 S.W.2d at 704. In each of those cases, the Court ultimately determined that the injury-causing activity was not impliedly required by the employer. *See Young*, 181 S.W.3d at 330; *Tucker*, 856 S.W.2d at 705.

Second, it is relevant to consider whether an employee would have suffered any adverse employment action for refusing to participate. *See Young*, 181 S.W.3d at 330 (observing that the plaintiff understood "that there would be no employment consequences for declining to participate"). Clearly, if an employer explicitly threatens to take adverse employment action against an employee for failing to participate in an activity, strong evidence exists that the employer is expressly requiring an employee to participate. However, even absent an explicit threat of adverse employment action, participation in an activity might be impliedly required if the employee is by some other means "made to understand that he [is] to participate." *Segars*, 1996 WL 164453, at *2.

Third, participation in an activity is neither expressly nor impliedly required solely because the employer rewards employees who choose to participate. For instance, in *Tucker*, the employer's reward of "aerobic bucks" to employees who participated on the softball team did not automatically make the activity required. *See Tucker*, 846 S.W.2d 704–05. In similar fashion, the *Young* Court held that "a nominal cash prize" was insufficient to prove that the plaintiff's participation in the three-legged race was impliedly required. *See Young*, 181 S.W.3d at 329.

Fourth, consistent with our standard of appellate review, our appellate courts defer to the determination of the trial court when there is conflicting testimony at trial. *See Cameron*, 2000 WL 1843399, at *3–4; *Segars*, 1996 WL 164453, at *3. However, in cases like *Young* and *Tucker*, where the facts were largely undisputed, our courts have

reversed as a matter of law a trial court's determination that an activity was impliedly required. *See Young*, 181 S.W.3d at 329; *Tucker*, 856 S.W.2d at 705.

Applying these principles to the present case, we conclude that Mr. Pope was not impliedly required to participate in the mud run. First, the parties agree that Mr. Mason, who had no supervisory authority over Mr. Pope, was the primary source of pressure on Mr. Pope to participate. In this way, the instant action is similar to *Tucker*, wherein a co-worker organized the softball team to which the plaintiff in that case belonged. *Tucker*, 856 S.W.2d at 704. Although the employer in *Tucker* did not specifically direct the plaintiff's co-worker to form a softball team, the employer embraced a variety of other actions (e.g., paying fees, providing equipment), making it clear to employees that participation was desired. *See id.*

Additionally, the parties agree that neither Mr. Triplett nor Mr. Mason threatened any adverse employment action against employees who declined to participate in the mud run. Mr. Triplett testified that he had no intention of punishing employees who declined to join the mud run team; in fact, he did not even know which individuals Mr. Mason was attempting to recruit. Mr. Pope also testified at trial that he did not believe he would be fired had he chosen not to participate. Ultimately, Mr. Pope chose to join the team because he did not want to be remembered as the person who prevented the team from competing. He also did not wish to be a "letdown for the team and for Eddie [Triplett]," whom he viewed as a father-figure. Although we respect Mr. Pope's loyalty to Mr. Triplett and his desire to avoid embarrassment with his colleagues, Mr. Pope's subjective feelings cannot convert an otherwise voluntary activity into one that is impliedly required. The absence of any adverse consequences weighs heavily against Mr. Pope's claim that he was impliedly required to join the mud run team.

Similarly, the fact that Mr. Triplett was perceived as "a carrot guy" and tended to "award[] those employees who participated in activities beyond one's assigned duties," is also insufficient to prove that participation in the mud run was impliedly required. Rewarding employees for participating in recreational activities does not necessarily make those activities required. *See Young*, 181 S.W.3d at 329 (awarding fifty dollars to winner of race was insufficient to make activity impliedly required); *Tucker*, 846 S.W.2d at 704–05 (awarding "aerobics bucks" was insufficient to make activity impliedly required).

Finally, in cases containing conflicting testimony, we defer to the judgment of the trial court. *See Cameron*, 2000 WL 1843399, at *3–4; *Segars*, 1996 WL 164453, at *3. Here, however, the facts are largely undisputed, and for the aforementioned reasons, the evidence preponderates against the trial court's finding that Mr. Pope's participation in the mud run was impliedly required.

D. Work Related

We now consider whether Toyota carried its burden of showing that Mr. Pope's participation in the mud run was not work related. Mr. Pope requests that this Panel affirm the trial court's determination that his participation was work related. In making that determination, the trial court emphasized several findings of fact. First, the trial court observed that the mud run took place on a Saturday during Mr. Pope's regular work hours. Testimony revealed that Saturday was Toyota's peak day for sales. Second, the trial court considered that "Mr. Triplett met with the Mud Run team during work hours a day or two before the Mud Run to hand out shirts and arrange for team members to meet at the dealership on the morning of the event and drive dealership vehicles to the event site." Third, the trial court noted Mr. Triplett's statement that he secured an earlier starting time so that his employees could return to the dealership "to sell cars." Finally, the trial court noted Mr. Triplett's testimony that he "would have been very disappointed if a team member had dropped out at the last minute."

Toyota, on the other hand, asks us to adopt the analysis of the Appeals Board, which determined that the trial court erred in finding participation in the mud run to be work related. Specifically, the Appeals Board determined that

> [w]hile it is undisputed that the mud run occurred during normal working hours, a Saturday morning, the record is devoid of evidence to support a finding that it was part of [Mr. Pope's] work duties. [Mr. Pope] was not paid for his time away from the dealership to participate in the event, which was one of his central reasons for initially declining to be on the team. He was not required to attempt to sell vehicles or network, was not required to staff [Toyota's] tent, and did not wear any clothing to identify him as an employee of [Toyota]. [Mr. Pope] did not identify any work duty he was expected to perform at the mud run. Instead, he merely expressed his opinion that participation was part of his work duties and that he was there in a representative capacity. However, it is unclear how he could have been representing [Toyota], as it was not readily apparent to anyone attending the event that he worked for [Toyota].

Both Toyota and the Appeals Board have also emphasized Mr. Triplett's testimony that he secured an earlier starting time so that the Toyota employees could return to the dealership as soon as possible to sell cars. In their view, Mr. Pope's primary work duty was to sell cars, and his participation in the mud run was a departure from that responsibility.

We agree with the Appeals Board that the evidence preponderates against the trial court's determination that the mud run was work related. We reiterate that Mr. Pope was not compensated for the time he spent at the mud run and that he was not required to make sales or to network while at the event. He also did not serve in a representative capacity because he was not wearing clothing that identified him as a company employee and he was not required to present himself as such.

Moreover, it is undisputed that Mr. Pope's participation in the mud run was a departure from his normal duty of selling cars. Although this does not automatically make the activity unrelated to work, *see Young*, 181 S.W.3d at 328 (stating that "activit[ies] may occur in the course of the employment even though the activity is outside the scope of the employee's normal duties or occurs off of the job site"), our prior determination that Toyota did not require Mr. Pope's participation weighs heavily against a finding that his participation in this recreational activity was work related. *See id.* ("[T]he fact that an injury occurs at an employer-sponsored event, . . . or during work hours, is not determinative of whether it occurred during the course of the employment. This is particularly so when participation in the activity causing the injury is not required by the employer.").

For the foregoing reasons, we conclude that Toyota satisfied its burden of proving that the mud run was not a work-related activity within the meaning of Tennessee Code Annotated section 50-6-110(a)(6)(C). We therefore affirm the holding of the Appeals Board on this issue. Furthermore, because Mr. Pope has not challenged the implied determination of the trial court and the Appeals Board that the remaining two exceptions listed in Tennessee Code Annotated section 50-6-110(a)(6) are inapplicable to this matter, we determine that any such challenge has been waived.

VI. Attorney's Fees

Having determined that the Appeals Board properly reversed the trial court's finding of compensability, we likewise conclude that the award of attorney's fees was also properly vacated, and any issue concerning the amount of such award is moot.

VII. Conclusion

For the foregoing reasons, we affirm the decision of the Appeals Board in all respects. This case is remanded to the trial court for collection of costs assessed below. Costs on appeal are taxed to the appellant, Gregory E. Pope, and his surety for which execution may issue if necessary.

_____
THOMAS R. FRIERSON, II, JUDGE

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

GREGORY E. POPE v. NEBCO OF CLEVELAND, INC. ET AL.

Workers' Compensation Appeals Board
No. 2015-01-0010

No. E2017-00254-SC-R3-WC

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs are assessed to the appellant, Gregory Pope, and his surety for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

GREGORY E. POPE v. NEBCO OF CLEVELAND, INC. ET AL.

Appeal from the Workers' Compensation Appeals Board
Court of Workers' Compensation Claims
No. 2015-01-0010 Thomas L. Wyatt, Judge

No. E2017-00254-SC-R3-WC

ORDER

The Special Workers' Compensation Appeals Panel filed its opinion in this appeal on January 16, 2018. The Supreme Court adopted and affirmed the Panel's findings of fact and conclusions of law, and the Panel's opinion was made the judgment of the Court. After due consideration, it is ORDERED that the Panel's opinion shall be published pursuant to Tenn. Sup. Ct. R. 4(A)(3). The Clerk shall provide a copy of this Order and the opinion to LexisNexis and to Thomson Reuters.

PER CURIAM