

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
August 21, 2014 Session

EDDIE ROY DAVIS v. YOUTH EMERGENCY SHELTER, ET AL.

Appeal from the Circuit Court for Hamblen County
No. 12CV258 Michael A. Faulk, Judge

No. E2014-00133-SC-R3-WC-MAILED-NOVEMBER 17, 2014
FILED-JANUARY 15, 2015

The trial court awarded permanent total disability benefits to the employee for bilateral carpal tunnel syndrome. It apportioned the award between the employer and the Second Injury Fund. Both have appealed. Pursuant to Tennessee Supreme Court Rule 51, the appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law. We affirm the trial court in its award for permanent and total disability benefits for a subsequent scheduled member injury.

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Circuit Court Affirmed

DON R. ASH, SR. J., delivered the opinion of the Court, in which SHARON G. LEE, C.J., and DEBORAH C. STEVENS, SP. J., joined.

David J. Deming and Michael L. Haynie, Nashville, Tennessee, for the appellant, Youth Emergency Shelter.

Robert E. Cooper, Jr., Attorney General and Reporter, and Alexander S. Rieger, Assistant Attorney General, Nashville, Tennessee for the appellant, Second Injury Fund.

James M. Davis, Morristown, Tennessee, for the appellee, Eddie Roy Davis.

OPINION

Factual and Procedural Background

Eddie Roy Davis was employed as the Executive Director of the Youth Emergency Shelter in Morristown, Tennessee, for thirty-two years. The Youth Emergency Shelter provided emergency services to at-risk children. Mr. Davis's job involved direct contact with the children, but consisted primarily of administrative and record keeping duties. He was initially injured on August 19, 2008, when a file cabinet fell on him. The incident caused serious injuries to his neck and abdomen. Numerous surgeries were required to treat the injuries. Mr. Davis attempted to return to his job, but was unable to do so. He was terminated on September 14, 2010. His claim for workers' compensation benefits for his injuries was tried in July 2012 and resulted in an award of 85% permanent partial disability.¹

While Mr. Davis was receiving treatment for his neck and abdominal injuries, he noticed symptoms of pain and numbness in his hands and lower arms. His treating neurosurgeon, Dr. Todd Abel, suspected the presence of carpal tunnel syndrome in early 2009. Dr. Abel also thought it was possible the symptoms were related to the neck injuries. In December 2009, nerve conduction studies were performed, and those tests confirmed Mr. Davis had bilateral carpal tunnel syndrome, moderate on the right side and mild on the left. Dr. Abel performed carpal tunnel release surgery on Mr. Davis's left side on April 15, 2011,

¹The current appeal pertains to a later action filed on October 19, 2012.

and on Mr. Davis's right side on May 20, 2011. A Benefit Review Conference was held concerning Mr. Davis's claim for benefits for carpal tunnel syndrome on October 19, 2012. The parties were unable to resolve their differences, and Mr. Davis filed this civil action in the Circuit Court for Hamblen County later the same day.

After the surgeries, Mr. Davis continued to have problems with his hands, including numbness and tingling in his fingers as well as a tendency to drop things. Dr. Abel testified by deposition it was difficult to determine which residual symptoms were caused by carpal tunnel syndrome and which were related to Mr. Davis's neck injury. In September 2011, Dr. Abel assigned a 1% permanent impairment to the body as a whole for each arm due to the carpal tunnel syndrome. He did not place any permanent restrictions on Mr. Davis's activities. Dr. Abel added Mr. Davis would "have some kind of ongoing pain from his hands, but if he can work around that or not, that's kind of up to him how bad it bothers him when he tries to use them."

Dr. William Kennedy, an orthopaedic surgeon, evaluated Mr. Davis on two occasions. On August 18, 2011, he spoke with Mr. Davis regarding his work history. On November 30, 2011, he spoke with Mr. Davis regarding his symptoms of carpal tunnel syndrome. In his deposition, Dr. Kennedy provided testimony regarding Mr. Davis's report his work involved extensive use of a computer keyboard. Dr. Kennedy considered Mr. Davis's work activities

to be the cause of the carpal tunnel syndrome. He reported Mr. Davis still had symptoms of intermittent numbness and tingling in both hands, reduced strength, and poor dexterity. He opined Mr. Davis retained a 3% impairment of the left arm and a 6% impairment of the right arm. He suggested the following activity restrictions:

[H]is activities of daily living and any employment should permanently not require rapid repeated motions or hammering or jerking with either hand.

He should not attempt to climb ladders or work at heights or under conditions such as on his hands and knees or crawling, in which his safety and stability would depend on the normal pain free sensory function and strength of both hands.

His hands should not be subjected to vibrations. He cannot be expected to operate a keyboard or write or handle small objects with normal accuracy and endurance with regard to either of his hands.

Lifting and carrying or pushing and pulling should not exceed twenty pounds occasionally or ten pounds frequently, assuming the use

of both hands together.

Lifting and carrying or pushing and pulling using either hand alone should not exceed five pounds occasionally.

Although Dr. Kennedy testified those restrictions were based solely on Mr. Davis's carpal tunnel syndrome, he stated during cross-examination he had recommended substantially similar restrictions in connection with the neck and abdominal injuries.

Mr. Davis was sixty-two years old when the trial took place in November 2013. He testified he had obtained an associate's degree from Walters State Community College, with a major in business and a minor in criminology. He had served more than six years in the Army, working primarily in the motor pool and personnel. Mr. Davis also sold insurance for two years and had worked as a humane officer for the Hamblen County Humane Society. He and his wife had been hired to staff the Youth Emergency Shelter when it was established.

Mr. Davis reported the carpal tunnel release surgeries had alleviated the acute pain in his hands and arms. However, he continued to have aching pain. His grip strength was diminished, and he often dropped objects. Mr. Davis was unable to tie a necktie, button a

shirt, or use a computer. He carried a hook with him to assist with zipping his trousers. His wife cut his food for him. Due to the limitations of his hands, his work continued to slow, and Mr. Davis became unable to continue his work with the Youth Emergency Shelter, despite his desire to do so.

Mr. Davis was appointed Coroner of Hamblen County in 1991 and continues to hold the position. He testified he “was out in the field all the time” prior to his injuries. Mr. Davis intended to retire, but was asked to continue in the position by the Medical Examiner and County Mayor, who “said they needed my knowledge.” He had been assisted by two deputies, but subsequently assisted by the increased number of four deputies. Mr. Davis testified deaths occurring outside a hospital, or in other specified circumstances, are investigated. A deputy is dispatched to gather information and draft a preliminary report. Mr. Davis then reviews the report with the deputy. He estimated there were twenty to thirty investigations per month and he spent ten to fifteen hours per month on his Coroner duties. He received a salary of \$600 per month from the county. During cross-examination, he agreed he drove approximately 4,000 miles per year in connection with his duties as Coroner.

While serving as Coroner, Mr. Davis wrote a book about quitting smoking. He also hosted a high school scoreboard show on a local radio station during football season. Mr. Davis had been a mediator in domestic relations cases, but also stopped working as a

mediator because of the amount of keyboarding required. He and his wife had formerly enjoyed traveling to the casino in Cherokee, North Carolina. After his work injuries, however, they made the trip less often. Mr. Davis testified his hands frequently cramped during the drive, and thus, he and his wife would have to make two planned stops during the eighty-nine-mile trip.

Dr. Rodney Caldwell, a vocational consultant, evaluated Mr. Davis. He attempted to administer the Minnesota Dexterity test twice, as is his practice, but Mr. Davis was only able to complete one trial. Mr. Davis scored 79 seconds on this test, well below the first percentile. Dr. Caldwell did not administer any educational tests. Dr. Caldwell opined Mr. Davis was totally disabled, with a vocational disability of 100% from the combined effects of the August 2008 injury and carpal tunnel syndrome. He further opined Mr. Davis had a vocational disability of 60% to 65% based on the restrictions assigned by Dr. Kennedy for carpal tunnel syndrome alone. Dr. Caldwell did not consider Mr. Davis's continuing work as Coroner to be significant, as his work as Coroner consisted mainly of reviewing and supervising work performed by others. On cross-examination, Dr. Caldwell agreed Dr. Abel had not placed any restrictions on Mr. Davis for his carpal tunnel syndrome. After some discussion, he admitted if no restrictions were applied, then there would be no vocational disability. However, Dr. Caldwell added Dr. Abel's remarks about Mr. Davis having to cope with the pain in his hands were consistent with a 90% vocational disability. He also testified

the position of Coroner required specialized knowledge and skills and added Mr. Davis told him he sometimes personally investigated suspicious deaths.

The trial court announced its findings and conclusions from the bench. Based on Mr. Davis's education, work experience, and the medical evidence concerning his limitations, the trial court found he was permanently and totally disabled. Pursuant to Tennessee Code Annotated section 50-6-208(a), the trial court held Mr. Davis had sustained a 65% partial disability solely as a result of the December 16, 2009 carpal tunnel syndrome injury. Therefore, 65% of the liability was apportioned to the Youth Emergency Shelter. The remainder was apportioned to the Second Injury Fund. Judgment was entered in accordance with those findings. Both the Youth Emergency Shelter and the Second Injury Fund have appealed, asserting the trial court erred by awarding permanent total disability benefits for a scheduled member injury. In the alternative, they contend the evidence preponderates against a finding of permanent total disability. The Youth Emergency Shelter also contends the award is excessive and incorrectly apportioned.

Analysis

We are statutorily required to review the trial court's factual findings "de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding,

unless the preponderance of the evidence is otherwise.” Tenn. Code Ann. § 50-6-225(e)(2) (2008). Following this standard, we are further required “to examine, in depth, a trial court’s factual findings and conclusions.” *Crew v. First Source Furniture Grp.*, 259 S.W.3d 656, 664 (Tenn. 2008) (quoting *Galloway v. Memphis Drum Serv.*, 822 S.W.2d 584, 586 (Tenn. 1991)). We give considerable deference to a trial court’s findings of fact based upon assessment of witnesses who testified before the trial court, but the same deference is not warranted for findings based upon depositions and other documentary evidence. *Padilla v. Twin City Fire Ins. Co.*, 324 S.W.3d 507, 511 (Tenn. 2010); *Glisson v. Mohon Int’l, Inc./Campbell Ray*, 185 S.W.3d 348, 353 (Tenn. 2006). We review conclusions of law de novo with no presumption of correctness. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). Although workers’ compensation law must be liberally construed in favor of an injured employee, the employee must prove all elements of his or her case by a preponderance of the evidence. *Crew*, 259 S.W.3d at 664; *Elmore v. Travelers Ins. Co.*, 824 S.W.2d 541, 543 (Tenn. 1992).

Permanent Total Disability - Subsequent Injury

The Youth Emergency Shelter and the Second Injury Fund raise two issues concerning the trial court’s award of permanent total disability benefits. First, they contend the trial court erred by making an award of permanent total disability based upon an injury to a

scheduled member.² Second, they contend Mr. Davis's continuing service as Coroner for Hamblen County precludes a finding of permanent total disability.

Citing *Watt v. Lumbermens Mut. Cas. Ins. Co.*, 62 S.W.3d 123 (Tenn. 2001), Mr. Davis asserts his disability was the result of the combination of two separate injuries, and, therefore, the trial court was correct in awarding permanent total disability. In *Watt*, the Court affirmed an award of permanent total disability benefits based on two separate scheduled member injuries. 62 S.W.3d at 132. We agree *Watt* supports Mr. Davis's position.

In *Watt*, the Supreme Court applied Tennessee Code Annotated section 50-6-208:

[S]ubsection (b) applies if the sum of two or more awards for permanent disability to the body as a whole equal or exceed 100 percent permanent disability . . . an employee does not have to be rendered permanently and totally disabled by the second injury for subsection (b) to apply, nor does subsection (b) contain any requirement that the employer have notice of the employee's prior injury.

²In this case, the scheduled members at issue are both of Mr. Davis's arms. Tenn. Code Ann. § 50-6-207(3)(A)(ii)(w) (2008).

Id. at 129 (quoting *Allen v. City of Gatlinburg*, 36 S.W.3d 73, 76 (Tenn. 2001)). The Court stated a second injury may lead the trial court to make a finding of fact the sum of the second injury and the first injury equals or exceeds 100%—or total permanent injury. Further, the combination of multiple injuries may result in a total permanent injury, even if the sum of each individual injury does not total 100%. *Watt*, 62 S.W.3d at 131. Although a trial court cannot reconsider past injuries or consider the award for past injuries in determining the present award, this “does not preclude the trial court from considering the synergistic effects of multiple disabling injuries.” *Id.* Therefore, an individual can have total permanent disability, even in those circumstances wherein each individual injury added together does not equal 100% disability.

In contrast, the Tennessee Supreme Court distinguished a scheduled member injury from a single event in *Ivey v. Trans Global Gas & Oil*, 3 S.W.3d 441, 448 (Tenn. 1999). In *Ivey*, the plaintiff suffered a compensable mental injury. At that time, loss of “mental faculties” was a scheduled member injury. *Id.* at 446-47. The trial court found the plaintiff was permanently and totally disabled and awarded benefits accordingly. *Id.* at 445. The Special Workers’ Compensation Appeals Panel affirmed the finding of total disability, but held the award of benefits was limited under the schedule for mental faculty injuries. *Id.* The Supreme Court reversed the Panel’s decision as to permanent total disability, stating “the courts are not free to assess the employee’s disability in terms of the body as a whole unless

the injuries at issue are not specifically enumerated as scheduled members.” *Id.* at 448 (citations omitted).

We find the present case differs from *Ivey*, as the carpal tunnel affecting Mr. Davis is a subsequent injury. Together with Mr. Davis’s prior workers’ compensation injury to his neck, the carpal tunnel affecting Mr. Davis caused total permanent disability to his body as a whole. We find the trial court appropriately determined Mr. Davis to be permanently and totally disabled.

Permanent Total Disability - Employment and Vocational Disability

As we find the trial court appropriately determined Mr. Davis to be permanently and totally disabled, we also find the trial court acted within its discretion in determining the amount of the award. The trial court found Mr. Davis’s employment as Coroner was a factor to be considered. However, the trial court also went on to state:

[I]t’s to be considered with all the other factors involved in applying the test for permanent disability, which is whether the employee in light of his education, abilities, physical and mental infirmities is employable on the open labor market.

This court doubts there's much available in the open labor market for Coroners. Tennessee has ninety-five counties and there's one, I understand, for each county. And I think there's a tiny, tiny labor market, if any, for Football Score Broadcasters on Friday Night.

So, the court makes the determination that the plaintiff is indeed permanently totally disabled.

Here, the trial court considered several factors, including the employee's skills, training, education, age, job opportunities in the immediate and surrounding communities, and the availability of work suited for an individual with that particular disability. *See Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 774 (Tenn. 2000); *Vinson v. United Postal Serv.*, 92 S.W.3d 380, 386 (Tenn. 2002). The trial court correctly considered the vocational disability of Mr. Davis, stating that his employment as Coroner was to be considered along with the other factors to determine his employability on the open labor market.

Further, the record reflects that Dr. Caldwell testified, based on the restrictions placed on Mr. Davis by Dr. Kennedy, Mr. Davis had a 60% to 65% vocational disability due to the carpal tunnel syndrome alone, in addition to being totally vocationally disabled. We agree with the findings of the trial court. Despite Mr. Davis's college education, varied experience,

and current minimal employment, Mr. Davis's injury causes continued pain, particularly when typing. Mr. Davis testified he no longer worked as a mediator due to the amount of typing required. We do not find the evidence showing Mr. Davis's continued employment as Coroner outweighs the other factors in this matter.

*Apportionment of Award between the Youth Emergency Shelter
and the Second Injury Fund*

Tennessee Code Annotated section 50-6-208(a)(1) provides as follows:

If an employee has previously sustained a permanent physical disability from any cause or origin and becomes permanently and totally disabled through a subsequent injury, the employee shall be entitled to compensation from the employee's employer or the employer's insurance company only for the disability that would have resulted from the subsequent injury, and the previous injury shall not be considered in estimating the compensation to which the employee may be entitled under this chapter from the employer or the employer's insurance company; provided, that in addition to the compensation for a subsequent injury, and after completion of the payments for the subsequent injury, then the employee shall be paid the remainder of the

compensation that would be due for the permanent total disability out of a special fund to be known as the second injury fund.

Tenn. Code Ann. § 50-6-208(a)(1). As the Supreme Court provided in *Watt*, and the Second Injury Fund stated in its argument, this statute requires the Second Injury Fund be responsible only for the portion of the trial court's award representing the balance after considering the amount of injury attributed to the second injury. Due to this allocation, the trial court must first determine the amount of compensation the employee would hypothetically receive if this injury were not secondary. *Allen*, 36 S.W.3d at 77.

The trial court's allocation was supported by Dr. Caldwell's testimony, which stated Mr. Davis had a vocational disability of 65% based on the restrictions Dr. Kennedy placed on him following the December 16, 2009 injury. The trial court appropriately separated this injury from the injury occurring in 2008 to determine the amount of the award, as well as the allocation between the Youth Emergency Shelter and the Second Injury Fund. The trial court relied upon the 2008 injury to consider the synergistic effects of the two disabling injuries, and ultimately provided a number with which to determine the appropriate allocation between the Youth Emergency Shelter and the Second Injury Fund by determining the disability would be 65% if Mr. Davis's carpal tunnel were his first injury, and not his subsequent injury. We hold the evidence does not preponderate against these findings.

Conclusion

The award of permanent total disability benefits is affirmed. Costs are taxed one-half to the Youth Emergency Shelter and its surety and one-half to the Second Injury Fund, for which execution may issue if necessary.

DON R. ASH, JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

EDDIE ROY DAVIS v. YOUTH EMERGENCY SHELTER, ET AL.

**Circuit Court for Hamblen County
No. 12CV258**

No. E2014-00133-SC-WCM-WC-FILED-JANUARY 15, 2015

ORDER

This case is before the Court upon the motion for review filed by Youth Emergency Shelter and Abigail Hudgens pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), 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.

It appears to the Court that the motion for review is not well taken and is, therefore, denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Youth Emergency Shelter and Abigail Hudgens and their surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Lee, C.J., not participating

