

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT NASHVILLE  
September 18, 2017 Session

**BILLY W. TANKERSLEY v. BATESVILLE CASKET COMPANY, INC., ET AL.**

**Appeal from the Chancery Court for Coffee County  
No. 2014-CV-34 Vanessa Jackson, Judge**

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**No. M2016-02389-SC-R3-WC – Mailed December 20, 2017  
Filed January 26, 2018**

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Billy Tankersley (“Employee”) worked for Batesville Casket Company (“Employer”) for thirty-seven years. He injured his right shoulder and arm on December 12, 2012. He ultimately was unable to return to work. He filed this action in the Chancery Court for Coffee County seeking permanent total disability benefits. The trial court found him to be permanently and totally disabled. The award was apportioned 90% to Employer and 10% to the Second Injury Fund. Employer has appealed. 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 pursuant to Tennessee Supreme Court Rule 51. We affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2014) (applicable to injuries occurring prior to July 1, 2014) Appeal as of Right; Judgment of the Chancery Court Affirmed**

JEFFREY S. BIVINS, C.J., delivered the opinion of the court, in which W. NEAL MCBRAYER and TIMOTHY L. EASTER, SP. JJ., joined.

B. Timothy Pirtle, McMinnville, Tennessee, for the appellant, Batesville Casket Company, Inc.

Jill T. Draughton, Nashville, Tennessee, for the appellee, Billy W. Tankersley.

Herbert H. Slatery, III, Attorney General and Reporter, and Brian A. Pierce, Assistant Attorney General, for the appellee, Tennessee Department of Labor, Second Injury Fund.

## OPINION

### Factual and Procedural Background

Employee was sixty-three years old at the time of trial. He had not attended school past the eighth grade. Employee worked as a “bagger” for almost his entire career and for his entire tenure with Employer. His job consisted of placing caskets into long bags, scanning paperwork, and printing and placing barcodes onto caskets. The bags were pulled from rolls that weighed as much as forty pounds. From time to time, it was necessary for Employee to replace those rolls by lifting them onto a spindle. On December 12, 2012, while working, he felt a popping sensation as he reached across a casket. He reported the incident immediately and was referred to the company nurse. He eventually came under the care of Dr. James Rungee, an orthopaedic surgeon.

Upon Dr. Rungee’s first examination of Employee, his diagnosis was a biceps tendon rupture and rotator cuff tear, which was confirmed through later testing. After a steroid injection failed to provide relief to Employee, Dr. Rungee recommended rotator cuff repair surgery. On the date the surgery was scheduled, Employee was found to have congestive heart failure, and the procedure was cancelled at that time.

Dr. Rungee testified that, after the cancellation of the surgery, Employee stated that his shoulder was “not hurting that much.” Around that time, Dr. Rungee and Employee began having a discussion of the increased risks of surgery caused by Employee’s heart problems and medications. Employee testified that he was told he could have bled to death during the operation and that the injury to his shoulder might not be fully corrected by the surgery. He further testified that he “thought it was better just to not have the surgery at the time.” However, Dr. Gupta, Employee’s cardiologist, later cleared Employee for the elective surgery in a letter to Dr. Rungee. Specifically, the letter stated that Employee was “stable to undergo the scheduled elective surgery.” Ultimately, Employee and Dr. Rungee mutually decided not to go through with the procedure. Dr. Rungee then assigned 6% permanent impairment to the body as a whole due to the shoulder injury. He permanently restricted Employee from lifting more than ten pounds with his right arm and from working overhead.

After being released by Dr. Rungee, Employee returned to work at his previous job as a bagger. Employer attempted to accommodate his restrictions by arranging for other workers to lift and handle rolls of bags when those tasks were necessary. However, the reaching motion necessary to place caskets into bags required Employee to continue

lifting his right arm, which caused pain. Thus, he was unable to work at the same pace as before his injury. Eventually, he was laid off because Employer had no work available within his restrictions.

Employee had numerous preexisting medical issues. He had a pacemaker due to heart problems and suffered from congestive heart failure. Two stents had been placed in his coronary arteries. He also had pulmonary problems that required him to use a Continuous Positive Airway Pressure (“CPAP”) breathing machine. These prior medical issues required Employee to take extended absences from work on several occasions. However, no work restrictions had been placed on Employee for any of the prior medical issues.

Michael Galloway, a vocational consultant, evaluated Employee and administered aptitude tests. The results showed that Employee was able to read words at a fifth-grade level, comprehend sentences at a fourth-grade level, and perform arithmetic at a sixth-grade level. Mr. Galloway opined that Employee retained no transferrable skills from his work as a bagger for Employer. Using a labor market consisting of eight counties near Employee’s residence, Mr. Galloway opined that Employee was 100% vocationally disabled. His opinion was based solely on the restrictions assigned by Dr. Rungee and not based on any preexisting health issues.

Mr. Robert Pease, an exercise physiologist, performed a functional capacity evaluation at Employer’s request on May 22, 2013. He opined that Employee’s breathing difficulties and heart problems limited his ability to perform physical tasks.

After hearing this evidence, the trial court took the case under advisement. It issued its findings and conclusions in a written Opinion and Order. The court found that Employee was permanently and totally disabled, and it awarded 400 weeks of benefits.<sup>1</sup> The court apportioned 90% of the award to Employer and 10% to the Second Injury Fund. Employer has appealed, contending that the trial court erred in its apportionment of liability. The appeal has been assigned to this Panel in accordance with Tennessee Supreme Court Rule 51.

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<sup>1</sup> This ruling was incorrect. Tennessee Code Annotated section 50-6-207(4)(A) (2014) (applicable to injuries occurring prior to July 1, 2014) provides that permanent total disability benefits are payable until the date the injured employee becomes eligible for Social Security retirement benefits. However, this error was corrected in the final judgment, which awarded approximately 293 weeks of benefits.

## Standard of Review

Appellate review of decisions in workers' compensation cases is governed by Tennessee Code Annotated section 50-6-225(a)(2) (2014) (applicable to injuries occurring prior to July 1, 2014), which provides that appellate courts must "[r]eview . . . the trial court's findings of fact . . . 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." As the Supreme Court has observed many times, reviewing courts must conduct an in-depth examination of the trial court's factual findings and conclusions. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). When the trial court has seen and heard the witnesses, considerable deference must be afforded the trial court's factual findings. Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008). No similar deference need be afforded the trial court's findings based upon documentary evidence such as depositions. Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). Similarly, reviewing courts afford no presumption of correctness to a trial court's conclusions of law. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

## Analysis

Employer does not appear to dispute that Employee is permanently and totally disabled.<sup>2</sup> Instead, Employer argues that the disability that prevents Employee from returning to work was caused in large part by Employee's preexisting medical conditions, and therefore, the trial court should have apportioned more liability to the Second Injury Fund. The Second Injury Fund contends that the trial court's distribution of liability should not be disturbed on appeal.

The Second Injury Fund's liability is outlined in Tennessee Code Annotated

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<sup>2</sup> We acknowledge that Employer stated as an issue "[w]hether plaintiff is permanently and totally disabled under T.C.A. [section] 50-6-208(a)(1)." However, Employer in its "Argument" section asserts no such argument, and, in fact, states "[t]he finding by the trial court of permanent total disability is supported by the testimony of plaintiff, his wife and his vocational expert." Accordingly, we conclude to the extent Employer was attempting to argue the permanent and total disability award was error, Employer has failed to properly preserve this issue on appeal. Thus, it is waived. See Roper v. First Presbyterian Church, No. M2007-02287-WC-R3-WC, 2008 WL 5101006, at \*5 (Tenn. Workers Comp. Panel Dec. 4, 2008) ("The failure of a party to cite any authority or to construct an argument regarding his position on appeal constitutes waiver of that issue.").

section 50-6-208(a)(1) (2014) (applicable to injuries occurring prior to July 1, 2014), which provides that employers should only be responsible for “the disability that would have resulted from the subsequent injury, and the previous injury shall not be considered in estimating the compensation . . . .”

In order for the Second Injury Fund to be liable, an employee must have (1) “sustained a permanent physical disability from any cause or origin . . . ,” and (2) must become ““permanently and totally disabled through a subsequent injury.”” Allen v. City of Gatlinburg, 36 S.W.3d 73, 76 (Tenn. 2001) (quoting Tenn. Code Ann. § 50-6-208(a)(3)). Accordingly, the Second Injury Fund is liable when the employee has “suffered a prior disabling injury from any source, including noncompensable sources, such as would have been attributable to a [prior injury].” Id. The employer also must have actual knowledge of the preexisting injury before the subsequent injury occurred. Id. (citing Tenn. Code Ann. § 50-6-208(a)(3)).

When applying this section, a trial court must “make an explicit finding of fact regarding the extent of vocational disability attributable to the subsequent or last injury, without consideration of any prior injuries.” Bomely v. Mid-Am. Corp., 970 S.W.2d 929, 934 (Tenn. 1998). Essentially, “the trial court must find what disability would have resulted if a person with no preexisting disabilities, in the same position as the plaintiff, had suffered the second injury but not the first.” Allen, 36 S.W.3d at 77. With this framework in mind, we turn to an examination of the findings of the trial court.

The trial court found “[Employee] is precluded from performing his past relevant work given the permanent restrictions assigned by Dr. Rungee.” The trial court made a finding that Employee had 6% permanent impairment to the body as a whole, a permanent restriction on lifting more than ten pounds with his right shoulder, and an order not to do any overhead work. More specifically, the court found that Employee retained a 90% permanent partial disability as a *direct result* of his work-related right shoulder/arm injury. When combined with the prior congestive heart failure the court found the Employee “totally incapacitated from working at an occupation which brings him income.” This led to a conclusion that Employee met the requirements of permanent total disability.

The trial court also found that Employer had actual knowledge of Employee’s prior congestive heart failure and, “[d]espite his heart condition and hearing loss, [Employee] remained gainfully employed prior to the injury which is the subject of his litigation. [Employee] had no work restrictions from his cardiologist resulting from his congestive heart failure and heart attack.” As a result, the trial court found that Employee

was permanently and totally disabled and apportioned the percent of disability between the prior medical issues and the work-related injury. Based on these findings, the trial court assessed Employer with 90% of the permanent disability award and the Second Injury Fund with 10% liability.

Employer argues on appeal that the primary error by the trial court was not properly taking into account the fact that the prior medical issues influenced or discouraged Employee from having a surgery that would have possibly allowed him to return to work. In other words, Employer argues that, although the prior medical issues themselves did not affect his permanent and total disability, their effect of discouraging or preventing him from having a corrective surgery did have such an effect.

We believe that the trial court properly considered the effect of the prior medical issues on Employee's ability to return to work. The trial court found that Employee was only 90% disabled as a result of the shoulder/arm injury. However, when combined with the prior medical issues, Employee was 100% totally and permanently disabled. Employee's own doctor, Dr. Rungee, testified that he based his work restrictions *solely* on Employee's shoulder/arm injury. Moreover, the vocational expert found that Employee was 100% vocationally disabled due to *the shoulder/arm injury*. We acknowledge that the prior medical issues may have prevented Employee from having a corrective surgery. However, the trial court properly considered the effect of those medical issues by apportioning 10% to the Second Injury Fund. The evidence does not preponderate against that finding.

### **Conclusion**

The judgment is affirmed. Costs are taxed to Batesville Casket Company, Inc., and its surety, for which execution may issue if necessary.

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JEFFREY S. BIVINS, CHIEF JUSTICE