

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

September 11, 2003 Session

**ELMER DAVID DOYLE v. UNITED PARCEL SERVICE, ET AL.**

**Direct Appeal from the Chancery Court for Madison County  
No. 57520 Joe C. Morris, Chancellor**

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**No. 2003-00078-SC-WCM-CV - Mailed October 21, 2003; Filed January 21, 2004**

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This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. Section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of the finding of fact and conclusions of law. The only issue submitted to the trial judge was the extent of the employee's permanent vocational disability. The employer appeals the award of permanent disability benefits to an employee. We affirm.

**Tenn. Code Ann. 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court Affirmed**

JOE H. WALKER, III SP.J., delivered the opinion of the court, in which JUSTICE JANICE M. HOLDER, J., and JOE C. LOSER SP.J., joined.

Mark W. Raines, R. Scott Vincent, and Lawrence W. White, Memphis, Tennessee for the appellants, United Parcel Service and Liberty Mutual Insurance Company.

David Hardee, Jackson, Tennessee, for the appellee, Elmer David Doyle.

**MEMORANDUM OPINION**

**FACTUAL BACKGROUND**

At the time of trial, Elmer David Doyle was 53 years of age and had worked for United Parcel Service since 1969. His work consisted of driving a truck and trailer and loading and unloading packages that weighed as much as one hundred and fifty pounds. In April 2000, he was injured when he was pushing a loading chute and fell between the dock and trailer, severely injuring his back. He underwent a two level lumbar fusion. He felt he was no longer able to work and retired.

Doyle's treating physician assigned a twenty-three percent (23%) medical impairment

rating to the body; an evaluating physician assigned a twenty-eight percent (28%) medical impairment rating to the body.

A vocational expert testified that Doyle has a low average I.Q., could read at the sixth grade level, and considering his medical restrictions was very limited vocationally. The expert testified that Doyle would have a 97% to 98% vocational disability on a national level, and that the local economy is more restrictive. Doyle could not return to his former work and had few transferable skills. According to the expert, there were no local jobs available for Doyle, and that he was not employable.

Doyle testified about the difficulty he has had since the accident. He can lift fifteen to twenty pounds at the most, walk no more than a quarter of a mile, and stand for no longer than thirty minutes. He has difficulty sitting, and can not pick up anything off the floor. He can not turn around and look out the back window when driving.

#### PERMANENT DISABILITY

The existence and extent of a permanent vocational disability are questions of fact for determination by the trial court and are reviewed de novo, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998).

The test as to whether an employee is permanently and totally disabled requires us to determine if the employee is "totally incapacitated . . . from working at an occupation which brings the employee an income . . . ." Tenn. Code Ann. § 50-6-207(4)(B) (1999). Section (B) further provides in pertinent part that "when an injury not otherwise specifically provided for in this chapter, as amended, totally incapacitates the employee from working at an occupation that brings such employee an income, such employee shall be considered 'totally disabled,' and for such disability compensation shall be paid provided for in subsection (4)(A) . . . ."

The determination of permanent and total disability is to be based on a variety of factors such that a complete picture of an individual's ability, or inability, to return to gainful employment is presented before the court. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770 at 774. Such factors include 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. Vinson v. United Parcel Service, 92 S.W.3d 380 (Tenn. 2002).

The trial judge found the employee to be a credible witness as to the nature and extent of his injury and ongoing problems. The trial judge found that the employee has not been able to work since he left the employment and is not presently capable of working. There is ample evidence in the record to support this finding.

Employer maintains that Doyle could not possibly have met his burden of proof that he is permanently totally disabled since he voluntarily retired and has not sought any employment since retiring. Employment after injury is only one factor to be considered in determining whether an employee is permanently and totally disabled, and when it is clear that an employee is unable to continue in his employment because of the injuries and is not employable in the

open job market, a finding of permanent total disability is warranted. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 775 (Tenn. 2000). We find the trial court did not err in awarding permanent and total disability benefits.

In this case, Doyle is permanently and totally disabled. The limitations set out in Tenn. Code Ann. § 50-6-241, do not apply to permanent total disability awards. Davis v. Reagan, 951 S.W.2d 766, 769 (Tenn. 1997). Therefore, in the present case, the contention of employer that the trial court erred in not limiting the award also is without merit.

The judgment of the trial court is affirmed; costs of appeal are taxed to appellant.

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JOE H. WALKER, III, SP.J.

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**JUDGMENT ORDER**

This case is before the Court upon the motion for review filed by appellants, United Parcel Service, Inc., and Liberty Mutual Insurance Company, pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 the defendants-appellants and their surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Holder, J., not participating