IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION PANEL
KNOXVILLE, JANUARY 1996 SESSION

ROBERT F. SEYMORE	)	
	)	WASHINGTON CHANCERY
Plaintiff/Appellee	)	
	)	HON. G. RICHARD JOHNSON,
v.	)	CHANCELLOR
	)	
SNAP-ON TOOLS CORPORATION,	)	NO. 03S01-9507-CH-00081
	)	
Defendant/Appellant	)	

For the Appellant:

Robert D. Van de Vuurst
Steven H. Trent
207 Mockingbird Ln.
P.O. Box 3038
Johnson City, TN 37602

For the Appellees:

Howell H. Sherrod, Jr.
249 East Main St.
Johnson City, TN 37604-5707

MEMORANDUM OPINION

Members of Panel:

E. Riley Anderson, Chief Justice, Supreme Court
John K. Byers, Senior Judge
Roger E. Thayer, Special Judge

AFFIRMED **THAYER, Special Judge**

_____This workers' compensation appeal has been referred to the Special

Workers'

Compensation Appeals Panel of the Supreme Court in accordance with TENN. CODE ANN. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

Defendant, Snap-On Tools Corporation, has appealed from the action of the trial court in awarding plaintiff, Robert F. Seymore, 40% permanent partial disability to each upper extremity.

Plaintiff is 52 years of age and has a 12th grade education. He suffered bilateral carpal tunnel syndrome injuries as a result of work-related activities. Surgery was performed on the right on July 13, 1993 and the left on August 31, 1993. He returned to work during October, 1993.

Plaintiff's job title is a heat treat operator, and he constantly uses his hands and wrists in his work. He testified that, after surgery, he felt some relief but most of his symptoms of pain and numbness have returned. He has continued to work without a drop in his production rate but says he still suffers from his injuries as he works and even after work. There is evidence from his wife and supervisor to substantiate his complaints of continuing problems.

The only issue on appeal is the extent of permanent disability.

Dr. Paul E. Gorman, an orthopedic surgeon, testified by deposition and did not give plaintiff any permanent impairment under the A.M.A. Guidelines. However, he testified plaintiff should be restricted in working. His restrictions included no overtime work, avoidance of vibration tools and no lifting or handling of items weighing in excess of 100 pounds.

Dr. Eric C. Roberts, a physician in physical medicine and rehabilitation, also testified by deposition and examined plaintiff for the purpose of giving an impairment rating. He agreed with the restrictions as imposed by Dr. Gorman but was of the opinion plaintiff had permanent impairment under A.M.A. Guidelines of ten percent to each upper extremity.

Defendant argues the testimony of the treating physician, Dr. Gorman, should outweigh the testimony of the non-treating physician, Dr. Roberts.

The review of the case is *de novo* on the record accompanied by a presumption of the correctness of the findings of fact unless the preponderance of the evidence is otherwise. TENN. CODE ANN. § 50-6-225(e)(2).

An employee has the burden of proving every element of the case, including causation and permanency by a preponderance of the evidence. *Tindall v. Waring Park Ass'n*, 725 S.W.2d 935, 937 (Tenn. 1987).

In choosing which medical testimony to accept, the trial court may consider the qualifications of the experts, the circumstances of their examination, the information available to them and the evaluation of the importance of that information by other experts. *Orman v. Williams-Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991).

Where the trial court has seen and heard witnesses and issues of credibility and the weight of oral testimony are involved, the trial court is in a better position to judge credibility and weigh evidence and considerable deference must be accorded to those circumstances. *Landers v. Fireman's Fund, Inc.*, 775 S.W.2d 355, 356 (Tenn. 1989). On the other hand, where evidence is introduced by deposition, the appellate court is in as good a position as the trial court in reviewing and weighing testimony. *Id*.

We are not aware of any rule of law which requires a court to accept and be bound by the testimony of a treating physician when it is in conflict with the testimony of another expert witness who has not treated the employee. To the contrary, the rule is that while the testimony of a treating physician is entitled to considerable weight, the court is not bound by the testimony of any expert witness. *See Orman*, 803 S.W.2d at 676; *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990).

From our independent review of the case, we find the evidence established

plaintiff has permanent disability to his arms. Although Dr. Gorman did not give an impairment rating, he placed restrictions on plaintiff's work activity.

In determining the extent of vocational disability, courts must ask whether the employee's earning capacity in relation to the open labor market has been diminished by residual impairment caused by a work-related injury and not whether the employee is able to return and perform the job held at the time of the injury. *Clark v. Nat'l Union Fire Ins. Co.*, 774 S.W.2d 586, 588 (Tenn. 1989).

We cannot say that the evidence preponderates against the award fixed by the trial court. Therefore, the judgment entered below is affirmed. Costs of the appeal are taxed to the defendant and sureties.

_____
Roger E. Thayer, Special Judge

CONCUR:

_____
E. Riley Anderson, Chief Justice

_____
John K. Byers, Senior Judge