IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE
(October 22, 1996 Session)

ANTHONY BATES,	)	DEKALB CIRCUIT
	)	
Plaintiff-Appellee,	)	Hon. John J. Maddux ,
	)	Judge.
v.	)	
	)	No. 01S01-9604-CV-00065
COOPER INDUSTRIES, INC.,	)	
MOOG AUTOMOTIVE, INC. and	)	
SENTRY INSURANCE COMPANY,	)	
	)	
Defendants-Appellants.	)	

For Appellants:

David J. Deming
James H. Tucker, Jr.
Manier, Herod, Hollabaugh & Smith
Nashville, Tennessee

For Appellee:

Frank Buck
Smithville, Tennessee

M E M O R A N D U M O P I N I O N

Members of Panel:

Frank F. Drowota, III, Associate Justice, Supreme Court
Robert S. Brandt, Senior Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED

Loser, Judge

MEMORANDUM OPINION

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this appeal, the employer and its insurer contend the evidence preponderates against the award of permanent partial disability benefits. As discussed below, the panel has concluded the judgment should be affirmed.

The employee or claimant, Bates, is thirty-six years old and a high school graduate. He has done nursery, construction, farming, factory and supervisory work. On September, 4, 1992, while lifting a thirty to forty pound box of coil springs to fill a customer's order, he strained his upper back. After a brief period of recuperation, during which he was treated conservatively by a neurological surgeon, he returned to work with weight lifting restrictions.

On May 26, 1994, he strained his lower back in another lifting accident at work and was treated by the same doctor. The doctor again treated the claimant conservatively and returned him to work. The treating doctor and two others to whom he was referred, one an orthopedist and one a pain management specialist, assigned zero percent permanent impairment, using appropriate guidelines.

The claimant was referred by his attorney or his family physician to another orthopedic surgeon, who diagnosed cervical and lumbar sprain and assigned a five to ten percent permanent whole person impairment. The disagreement is over whether the injury is in "category one" or "category two," as defined by the guidelines, which involves "a judgment call." The claimant has been terminated because the employer was unwilling to offer him a job within his lifting restrictions.

A vocational expert has estimated the claimant's industrial disability at fifty-five to sixty percent. The claimant's own testimony is that he is able to work at a job not requiring repetitive or heavy lifting.

The trial court awarded permanent partial disability benefits based on forty-five percent to the body as a whole. Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. section 50-6-225(e)(2). This tribunal is required to conduct an independent examination of the evidence to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921 (Tenn. 1995).

Once the causation and permanency of an injury have been established by expert testimony, the courts may consider many pertinent factors, including age, job skills, education, training, duration of disability and job opportunities for the disabled, in addition to anatomical impairment, for the purpose of evaluating the extent of a claimant's permanent disability. Tenn. Code Ann. section 50-6-241(a)(2). The trial judge chose to accept the opinion of one physician, who testified favorably to the claimant, and reject the testimony of three others. In a workers' compensation case, the trial judge has the discretion to determine which expert medical testimony to accept, when such evidence conflicts. Kellerman v. Food Lion, Inc., 929 S.W.2d 333 (Tenn. 1996).

We are persuaded that the circumstances of this case permit greater weight to be given that doctor, who is the only one that found objective evidence of injury, but we are not persuaded that the other medical proof should be completely rejected. All the proof should be given the weight it deserves.

From our independent examination of the evidence, we find the evidence fails to preponderate against the findings of the trial court; and we find no abuse of discretion. The judgment is accordingly affirmed. Costs on appeal are taxed to the defendants-appellants.

_____

Joe C. Loser, Jr., Special Judge

CONCUR:

_____

Frank F. Drowota, III, Associate Justice

_____

Robert S. Brandt, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

FILED

March 24, 1997

Cecil W. Crowson
Appellate Court Clerk

ANTHONY BATES,	}	*DEKALB CIRCUIT*
	}	*No. 6902 Below*
Plaintiff/Appellee	}	
	}	*Hon. John J. Maddux,*
vs.	}	*Judge*
	}	
COOPER INDUSTRIES, INC., and	}	*No. 01S01-9604-CV-00065*
MOOG AUTOMOTIVE, INC., and	}	
SENTRY INSURANCE COMPANY,	}	
	}	
Defendants/Appellants	}	*AFFIRMED.*

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 will be paid by Defendants/Appellants and Surety for which execution may issue if necessary.

IT IS SO ORDERED on March 24, 1997.

PER CURIAM