

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
(May 6, 1998 Session)

JAMES G. COOPER,)	JEFFERSON CIRCUIT
)	
Plaintiff-Appellee,)	Hon. Rex Henry Ogle,
)	Judge.
v.)	
)	No. 03S01-9709-CV-00114
ASARCO INCORPORATED,)	
)	
Defendant-Appellant.)	

For Appellant:

Arthur G. Seymour
Robert L. Kahn
Knoxville, Tennessee

For Appellee:

Lynn Bergwerk
Memphis, Tennessee

MEMORANDUM OPINION

Members of Panel:

Charles D. Susano, Jr., Special Justice, Supreme Court
John K. Byers, 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. The employer contends the award of permanent partial disability benefits based on seventy-five percent to the leg is excessive. As discussed below, the panel has concluded the award should be affirmed.

The employee or claimant, Cooper, is sixty-one years old and has a fourth grade education, but cannot read. He has worked as garbage collector, laborer and welder. He suffered a compensable knee injury on January 19, 1995, but continued to work with pain and swelling until April of the same year when he consulted an orthopedic surgeon.

When the pain and swelling persisted, the surgeon performed arthroscopic surgery and diagnosed mild spurring and joint effusion superimposed on degenerative arthritis. The claimant was returned to work with permanent restrictions. The employer has made accommodations and the claimant has returned to work with restrictions and limitations.

The trial judge found the claimant entitled to permanent partial disability benefits based on seventy-five percent to the injured leg. Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. section 50-6-225(e)(2). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Presley v. Bennett, 860 S.W.2d 857 (Tenn. 1993). Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review. Kellerman v. Food Lion, Inc., 929 S.W.2d 333 (Tenn. 1996). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672 (Tenn. 1991).

Once the causation and permanency of an injury have been established by expert testimony, the trial judge 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. McCaleb v. Saturn Corp., 910 S.W.2d 412 (Tenn. 1995). The opinion of a qualified expert with respect to a claimant's clinical or physical impairment is a factor which the court will consider along with all other relevant facts and circumstances, but it is for the courts to determine the percentage of the claimant's industrial disability. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675 (Tenn. 1983). While expert testimony may be used to establish vocational disability, it is not required. Perkins v. Enterprise Truck Lines, Inc., 896 S.W.2d 123 (Tenn. 1995).

Causation is not an issue in the case. However, the proof clearly shows that the claimant was able to work without restrictions before his accident, but not after the accident. Permanency was established by the deposition testimony of the treating physician. As already noted, Mr. Cooper is sixty-one, virtually uneducated and is severely limited in terms of job skills. His treating physician estimated his permanent clinical impairment at twelve percent to the right leg.

All of the other proof before the trial judge was by oral testimony and the trial judge had the opportunity to observe the claimant and his lay witnesses. He found them to be credible. Under all the circumstances, this tribunal is thus unable to say that the evidence preponderates against the findings of the trial court.

The judgment of the trial court is accordingly affirmed. Costs on appeal are taxed to the appellant and the cause is remanded to the Circuit Court of Jefferson County for an award of interest on accrued but unpaid benefits and all other purposes.

Joe C. Loser, Jr., Special Judge

CONCUR:

Charles D. Susano, Jr., Special Justice

John K. Byers, Senior Judge

