

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

**FILED**  
December 3, 1998  
Cecil W. Crowson  
Appellate Court Clerk

<i>JAMES DARVIN HARVEY</i>	}	<i>SEQUATCHIE CIRCUIT</i>
	}	<i>No. Below 6752</i>
<i>Plaintiff/Appellee</i>	}	
	}	<i>Hon. Thomas W. Graham</i>
<i>vs.</i>	}	<i>Judge</i>
	}	
	}	<i>No. 01S01-9804-CV-00073</i>
<i>MUELLER COMPANY</i>	}	
	}	
<i>Defendant/Appellant</i>	}	
	}	<i>AFFIRMED</i>

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 defendant/appellant, for which execution may issue if necessary.*

*IT IS SO ORDERED on December 3, 1998.*

*PER CURIAM*

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE  
(September 16, 1998 Session)

**FILED**

**December 3, 1998**

**Cecil W. Crowson  
Appellate Court Clerk**

JAMES DARVIN HARVEY,	)	SEQUATCHIE CIRCUIT
	)	
Plaintiff-Appellee,	)	Hon. Thomas Graham,
	)	Judge.
v.	)	
	)	No. 01S01-9804-CV-00073
MUELLER COMPANY,	)	
	)	
Defendant-Appellant.	)	

For Appellant:

Joseph R. White  
Carl E. Shiles  
Spears, Moore, Rebman & Williams  
Chattanooga, Tennessee

For Appellee:

L. Thomas Austin  
M. Keith Davis  
Dunlap, Tennessee

MEMORANDUM OPINION

Members of Panel:

Frank F. Drowota, III, Associate Justice, Supreme Court  
William H. Inman, Senior Judge  
Joe C. Loser, Jr., Special Judge

AFFIRMED  
Judge

Loser,

## 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, Mueller Company, insists the evidence preponderates against the trial judge's award of permanent partial disability benefits based on forty-five percent to the body as a whole and in favor of one based on not more than eleven percent to the body as a whole. As discussed below, the panel has concluded the judgment should be affirmed.

Our 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). 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. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Krick v. City of Lawrenceburg, 945 S.W.2d 709 (Tenn. 1997). Extent of vocational disability is a question of fact. Collins v. Howmet Corp., 970 S.W.2d 941 (Tenn. 1998).

At the time of the trial, the claimant or employee, Harvey, was fifty-five years old. He has a G.E.D., is a former member of the National Guard and has worked for Wheland Foundry, Tennessee Consolidated Coal, Quaker Oats and Mueller. In July of 1995, while working for Mueller as a maintenance mechanic, he fell from a height of three to three and one-half feet to a concrete floor. He was placed on light duty. Later, he reported to Dr. Rankine; and he was also seen by Dr. Gallagher.

Dr. David A. Rankine, a neurologist, testified by deposition that he first saw the claimant on October 25, 1995, ordered magnetic resonance testing and, from test results, diagnosed a lumbar disc rupture. A second test revealed mild bulging of the disc, but no herniation. The doctor provided conservative care until the claimant reached maximum medical recovery on November 26, 1996. He opined the injury was probably an aggravation of an old injury, assessed thirty percent permanent impairment and recommended the claimant refrain from lifting more than thirty pounds or engaging in more than moderate to light duty.

Dr. Michael R. Gallagher, another neurologist, also testified by deposition. He evaluated the claimant at the request of the employer. Dr. Gallagher found no significant disc herniation and assessed the claimant's permanent impairment at eleven percent to the whole body.

The trial judge gave greater weight to the opinion of Dr. Rankine because he was the treating physician and because Dr. Gallagher's opinion was based largely on the findings of others, whose credibility could not be tested. The

employer contends Dr. Rankine should be discredited because he did not properly use the AMA guidelines in estimating permanent impairment.

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. Tenn. Code Ann. section 50-6-241(a)(2). 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. Kellwood Co. v. Gibson, 581 S.W.2d 645 (Tenn. 1979). When medical testimony differs, it is within the discretion of the trial judge to determine which expert testimony to accept. Hinson v. Walmart Stores, Inc., 654 S.W.2d 675, 677 (Tenn. 1983).

It is undisputed that the claimant is restricted by his treating physician from anything but moderate to light work and that he has been on light work since the accident. His own testimony and other lay testimony tend to support the opinion of Dr. Rankine. For the reasons stated herein, the evidence fails to preponderate against the findings of the trial judge.

The judgment of the trial court is accordingly affirmed. Costs on appeal are taxed to the defendant-appellant.

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Joe C. Loser, Jr., Special Judge

CONCUR:

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Frank F. Drowota, III, Associate Justice

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William H. Inman, Senior Judge