

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT JACKSON  
April 23, 2007 Session

**JOHNNY TOWNSEND v. C & GM URBAN ELECTRIC SERVICE, INC, ET  
AL.**

**Direct Appeal from the Chancery Court for Davidson County  
No. 05-1135-II Carol McCoy, Chancellor**

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**No. M2006-01165-WC-R3-WC - Mailed - August 23, 2007  
Filed - October 10, 2007**

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This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The court awarded 33% permanent partial disability to the body as a whole. The employee has appealed that ruling, contending that the trial court erred in excluding medical proof concerning a pre-existing disability unrelated to his work injury. The employee further contends that the trial court erred in failing to award permanent total disability benefits. We conclude that the exclusion of the medical evidence was error, but that it did not affect the result of the case. We affirm the judgment of the trial court as to permanent partial disability benefits.

**Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right; Judgment of the Chancery Court  
Affirmed.**

ALLEN W. WALLACE, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, J. and DONALD P. HARRIS, SR. J., joined.

Daniel C. Todd, Nashville, Tennessee for the Appellant, Johnny Townsend

Elaine M. Youngblood, Nashville, Tennessee for the Appellees, C & GM Urban Electric Service, Inc. and Firstcomp Group

**MEMORANDUM OPINION**

**FACTUAL AND PROCEDURAL BACKGROUND**

Johnny Townsend ("Employee") was thirty-six years old on the date of trial. He was a high school graduate. He had taken one semester of classes at Nashville State Tech. He had also taken

a six-week course directed toward obtaining an electrician's license but had not applied for or received a license. His work history was primarily as an electrician's helper. He had worked for C & GM Urban Electric Service ("Employer") off and on in that capacity for several years. He had also worked for a picture framing company, a bowling alley and a restaurant.

Employee was born with a congenital abnormality known as club feet. As a result of that condition, he had undergone numerous corrective surgeries prior to his eighth birthday. After that, he had no additional medical treatment for that condition until either 2000 or 2002. Braces were prescribed at that time, which he sometimes wore. However, he felt that the braces interfered with his work, so he did not wear them often. He had no additional treatment for his feet until he suffered an injury as a result of a fall not related to his employment in September 2005. Employee testified that he had pain in his feet and ankles after working throughout the period he worked for Employer. Two representatives of Employer testified that they had no knowledge of these problems, although it was conceded that he was seen wearing the above-mentioned braces on occasion.

The injury at issue occurred on October 1, 2004. Employee was drilling a hole in some fiberglass. The drill bit "hung up," causing the drill to rotate, which twisted his right shoulder. The injury was accepted as compensable. Dr. Blake Garside was the treating physician. He diagnosed a biceps tear. This was surgically repaired, but Employee continued to have symptoms. An MRI was ordered that revealed a rotator cuff tear. Dr. Garside performed a surgical repair of that injury in January 2005. He released Employee to return to work on June 8, 2005. Dr. Garside opined that Employee retained a 6% impairment to the body as a whole as a result of the biceps and shoulder injuries. He also placed the following restrictions on Employee's activities: occasional overhead work, no overhead lifting with the right extremity, and limit lifting with the right arm to fifty pounds occasionally, twenty pounds frequently, and ten pounds constantly. Employee did not return to work for Employer. The parties stipulated that Employer could not accommodate these restrictions. Employee did not seek other employment prior to his non-work injury in September 2005. He was still recovering from that injury at the time of the trial of this matter.

Employee was evaluated by Dr. David Gaw on two occasions, once for his shoulder injury and a second time for his pre-existing foot problems. Employee filed C-32's from Dr. Gaw prior to trial. Employer did not object to these within twenty days of the filing date. However, shortly before trial, Employer filed a motion *in limine* requesting that the second C-32 (concerning the feet) be excluded. The stated ground for the motion was that the foot injury sustained by Employee in September 2005 was irrelevant to the issues to be tried. As the report of Dr. Gaw was prepared before the September 2005 injury, Employer amended its position at trial, contending that the proposed evidence was irrelevant because the work injury did not aggravate or worsen any disabilities which Employee had as a result of his feet. The trial court sustained the motion; the C-32 was marked for identification only.<sup>1</sup> The first C-32, which concerned Employee's shoulder, was

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<sup>1</sup> Dr. Gaw assigned impairments of 29% to the left lower extremity and 23% to the right lower extremity. He suggested restrictions of three hours per work day either standing or walking and occasional climbing, balancing, stooping, kneeling, and crawling.

admitted without objection. In that report, Dr. Gaw assigned a 5% whole body impairment and assigned somewhat less restrictive limitations on Employee's activities than Dr. Garside had done.

Each side presented testimony of a vocational evaluator. Employee introduced the deposition of Thomas Elliot. Elliot administered intelligence and achievement tests to Employee. He found that Employee had an IQ of ninety-three, which is in the average range. He further found that Employee was able to read at the twelfth-grade level. He opined that Employee had sustained a 65% vocational impairment as a result of his shoulder injury alone and a 100% vocational impairment as a result of the combination of his shoulder injury and his pre-existing foot problems. Patsy Bramlett performed an evaluation for Employer based upon a review of medical records, Elliott's report, and other information. She opined that Employee had a vocational impairment of 23%.

The trial court awarded 33% permanent partial disability to the body as a whole.

## ISSUES

Employee has appealed from the judgment of the trial court, raising two issues. First, he contends that the trial court erred in excluding Dr. Gaw's C-32 concerning his pre-existing foot problems from evidence. Second, he argues that the trial court erred by failing to find that he was permanently and totally disabled as a result of the combined effects of his work injury and his pre-existing disability.

## STANDARD OF REVIEW

Our standard of review of factual issues in a workers' compensation case is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2005); Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). When issues of credibility of witnesses and the weight to be given their in-court testimony are before the reviewing court, considerable deference must be accorded to the factual findings of the trial court. Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 733 (Tenn. 2002). When expert medical testimony differs, it is within the trial judge's discretion to accept the opinion of one expert over another. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-77 (Tenn. 1983). This Court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997). Questions of law are reviewed de novo with no presumption of correctness afforded to the trial court's conclusions. Gray v. Cullom Mach., Tool & Die, 152 S.W.3d 439, 443 (Tenn. 2004).

## ANALYSIS

Employee filed Dr. Gaw's C-32<sup>2</sup> several months before the trial. Employer did not file an objection pursuant to Tennessee Code Annotated section 50-6-235(c)(2) (2005). Employer did file a motion *in limine* pertaining to that document. The motion was ultimately sustained. The report was not admitted into evidence but was marked for identification and included in the record as an offer of proof. Employee contends that Employer waived all objections to the C-32 by failing to object within ten days of filing, as outlined in Tennessee Code Annotated section 50-6-235(c)(2). Employee cites no cases which consider the consequences of failing to make such an objection. Employee's brief cites only the language of the statute, which states in pertinent part:

The written medical report of a treating or examining physician shall be admissible at any stage of a workers' compensation claim in lieu of a deposition upon oral examination, if notice of intent to use the sworn statement is provided to the opposing party or counsel not less than twenty (20) days before the date of intended use. If no objection is filed within ten (10) days of the receipt of such notice, the sworn statement shall be admissible as described in this subsection (c).

The statute does not specify whether an opposing party waives all objections to the report by failing to object within the ten-day period or only those objections concerning the report's compliance with the formal requirements described in Tennessee Code Annotated section 50-6-235(c)(1), e.g. a statement of the physician's qualifications or a notarized signature. However, the statute does say that the report is used "in lieu of a deposition upon oral examination." The clear intent of the statute is to provide an alternative to evidentiary medical deposition. See Salyers v. Jones Plastic & Eng'g Co., No. W2004-02979-WC-R3-CV, 2005 WL 2412879, \*6 (Tenn. Workers' Comp. Panel, Sept. 29, 2005); Nelson v. Magnetic Separation Sys., Inc., No. M1999-02009-WC-R3-CV, 2001 WL 114663, (Tenn. Workers' Comp. Panel, Feb. 12, 2001). Tennessee Rule Civil Procedure 32.02 addresses objections to depositions offered at trial: "[O]bjection may be made at the trial or hearing to receiving in evidence any deposition or portion thereof for any reason which would require exclusion of the evidence if the witness were then present and testifying." Employer's objection in this case could have been made at trial if the proof had been presented by deposition, rather than by C-32. There is no readily apparent reason for treating the latter differently from the former, nor does doing so prejudice or reduce the rights of the party who chooses this method of presenting evidence.

We conclude that Employer did not waive its objection to the relevance of Dr. Gaw's C-32 concerning Employee's pre-existing foot condition. However, we conclude that the substance of that objection is without merit for the reasons set out below.

Employer contends that the subject of the C-32, Employee's pre-existing medical condition,

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<sup>2</sup> This issue concerns only the second C-32 of Dr. Gaw, which addressed Employee's pre-existing foot condition. The first C-32, which addressed the shoulder injury, was admitted without objection.

is irrelevant to the extent of his vocational disability from this injury. The factors to be examined in determining the extent of permanent partial disability include the employee's age, education and work history, medical evidence concerning impairment and restrictions, and other matters. See Ware v. U. S. Steel Corp., 541 S.W.2d 107, 111 (Tenn. 1976). In Express Pers. Servs., Inc. v. Belcher, 86 S.W3d 498 (Tenn. Workers' Comp. Panel 2002), a previous Panel of this Court held that an employee's prior criminal record was a relevant factor in evaluating the jobs that were available or unavailable to her in the job market. The extent to which his congenital condition did, or did not, limit Employee's access to the job market would similarly be relevant to the question of permanent disability. The trial court erred by excluding this evidence. However, pursuant to Tennessee Rule of Appellate Procedure 36(b) we find that admission of the evidence would not change the result of the trial.

Employee contended at trial, and contends in this Court, that he is permanently and totally disabled as a result of the combination of his work injury and his pre-existing medical condition. The trial court stated in its initial ruling "If I were to consider the documentation and the information submitted as a matter of proof [i.e. the excluded C-32], the Court would still decline to find permanent and total disability." At a subsequent hearing on Employee's motion to alter or amend the judgment, counsel for Employee asked the court "Your Honor, are you making a finding as to, if you were to consider the excluded proof, you would still not find total disability . . .?" The court responded by stating: "Oh, having looked at Dr. Gaw's C-32 in light of what we've just talked about, that it evaluated his club feet, I would still make the same conclusion."

Permanent total disability occurs when an injured employee is totally incapacitated "from working at an occupation which brings the employee an income." Tenn. Code Ann. § 50-6-207(4)(B)(2005). The evidence at trial showed that Employee's pre-existing condition did not significantly limit his access to the job market. His work as an electrician's assistant, which he had performed for Employer and others for some years, was strenuous. He performed that job adequately, although he missed work from time to time when his feet were especially troublesome. His employer was unaware of the existence of the condition. He had received medical treatment for the condition only occasionally since his eighth birthday. Employee presented the testimony of a vocational evaluator who opined that he had sustained a 100% vocational disability and Employer presented vocational testimony that the vocational disability was 23%. Employee was thirty-six years old, a high school graduate, had one semester of community college, and was able to read at a twelfth-grade level. In consideration of those factors, we conclude that the evidence does not preponderate against the trial court's finding that Employee is not permanently and totally disabled by the combined effects of his pre-existing condition and his shoulder injury.

## CONCLUSION

We find that the trial court erred in excluding the second C-32 of Dr. Gaw, but that the error did not affect the result of the trial. We affirm the judgment of the trial court in all other respects.

Costs are taxed to Appellant, Johnny Townsend, and his surety, for which execution may issue if necessary.

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ALLEN W. WALLACE, SENIOR JUDGE

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AT NASHVILLE

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**No. M2006-01165-SC-WCM-WC - Filed - October 10, 2007**

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**ORDER**

This case is before the Court upon the motion for review filed by Johnny Townsend 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 Johnny Townsend, for which execution may issue if necessary.

PER CURIAM

HOLDER, J. - NOT PARTICIPATING

