

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 27, 2001 Session

FREEMAN DECORATING COMPANY v. JOSEPH W. BOWERS

**Direct Appeal from the Chancery Court Part I for Davidson County
No. 00-2118-I Irvin H. Kilcrease, Jr., Chancellor**

**No. M2001-01750-WC-R3-CV - Mailed - May 15, 2002
Filed - June 17, 2002**

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. The trial judge found the plaintiff had suffered no compensable injury. The trial judge made contingent findings that if the injury was compensable the plaintiff would be entitled to ten percent (10%) vocational impairment to the body as a whole and that the defendant's average weekly wage was \$105.06. We affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court
Affirmed**

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which FRANK F. DROWOTA III, C. J. and JOE C. LOSER, SP. J., joined.

Randall C. Ferguson, Nashville, Tennessee, for the appellant, Joseph W. Bowers.

Daniel C. Todd, Nashville, Tennessee, for the appellee, Freeman Decorating Company.

MEMORANDUM OPINION

We are unable to set out the facts and applicable law hereto better than did the Chancellor in his Memorandum Opinion. We thereby adopt the findings made by the Chancellor and quote as follows:

Findings of Fact

Defendant is forty-five (45) years of age and a resident of

Sumner County, TN. He is a high school graduate. Defendant has received no further training.

Prior to coming on to work with plaintiff, defendant worked as a musician and in the pro sports arena.

Defendant underwent three prior neck surgeries in 1989, 1992 and 1994.

On September 30, 1999, defendant was loading a sofa on a truck when he felt pain in his neck and left arm.

Dr. John J. Kruse, a neurosurgeon, treated defendant and concluded that defendant suffered no anatomical change as a result of the September 30, 1999 incident but simply sustained increased pain. However, Dr. David Gaw, an orthopaedic surgeon and the independent medical evaluator, concluded that defendant suffered a compensable aggravation of the preexisting cervical spinal stenosis. Thus, he assigned defendant an anatomical impairment of twenty-six percent (26%) to the body as a whole.

Defendant has been employed since reaching maximum medical improvement.

John J. Kruse, M.D.

Dr. John J. Kruse, a neurosurgeon, first treated defendant on October 20, 1999. Defendant informed Dr. Kruse that he had undergone a cervical laminectomy in 1985. After taking defendant's medical history and conducting a physical examination, he concluded that defendant suffered from multi-level spondylosis of cervical spine with loss of cervical lordosis and collapse of many disk spaces anteriorly. He further opined that defendant's condition was work related and assigned him an anatomical impairment of fifteen percent (15%) to the body as a whole.

However, subsequent to submitting the Standard Form Medical Report, Dr. Kruse learned that defendant had in fact undergone surgeries to his neck in 1991 and 1994. As a result, he recanted his previous diagnosis and concluded that defendant "did not sustain any permanent anatomic injury as a result of his work accident of September 1999." Dr. Kruse explained that the laminectomy that defendant underwent on January 25, 2000 was

identical to his previous surgeries. In fact the September 1999 work accident only caused a flare up of pain. Defendant reached maximum medical improvement and was released to return to work on May 18, 2000.

Conclusions of Law

The plaintiff has the burden of proving a compensable injury by a preponderance of the evidence. *Oster v. Yates*, 845 S.W.2d 215 (Tenn. 1992). This burden is met if sufficient expert medical testimony is provided to demonstrate causation and permanency of a work-related injury. *Tindall v. Waring Park Ass'n*, 725 S.W.2d 935 (Tenn. 1987). A compensable injury is found when a “causal connection [is made] between the workman’s accidental injury . . . and the nature of his employment.” *Aetna Cas. & Sur. Co. v. Long*, 569 S.W.2d 444 (Tenn. 1978).

It is well settled that aggravation of a pre-existing condition may be compensable under the workers’ compensation laws of Tennessee, but it is not compensable if it results only in increased pain or other symptoms caused by the underlying condition. *Sweat v. Superior Industries, Inc.*, 966 S.W.2d 31 (Tenn. 1998).

This court has before it the medical opinion of two physicians. Dr. Kruse, the treating and operating physician, opined that defendant did not sustain an anatomical change but only increased pain. However, Dr. Gaw, the independent medical evaluator, opined that defendant suffered an anatomical change. When faced with differing medical opinion, the Court must determine which expert opinion is more credible. *Johnson v. Schevell Ready Mix Inc.*, 698 S.W.2d 582 (Tenn. 1980). In making this decision, the Court considers qualifications of experts, circumstances of their evaluations, information available to them, and the evaluation of the importance of that information by other experts. *Hinson v. Walmart*, 654 S.W.2d 675 (Tenn. 1983). This court finds the medical opinion of Dr. Kruse more credible. Thus, this court is of the opinion that defendant did not suffer a compensable aggravation of a preexisting injury to his neck.

If, however, this court had found compensability, defendant would be entitled to a vocational impairment of ten percent (10%) to the body as whole. He would also be entitled to future medical expenses.

In addition the average weekly wage should be calculated according to Tenn. Code Ann. § 50-6-102(2)(B) which states:

Where the employment prior to the injury extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employees' unearned wages shall be followed, provided, that results just and fair to both parties, will thereby be obtained.

Thus, defendant's wages of \$5,460.36 is divided by fifty-two (52) weeks. Thus, defendant's average weekly wage is \$105.06 which equates to a worker's compensation rate of \$81.15. *See, Russell v. Genesco*, 651 S.W.2d 206 (Tenn. 1983).

We affirm the judgment of the trial court. The cost of this appeal is taxed to the plaintiff, Joseph W. Bowers.

JOHN K. BYERS, SENIOR JUDGE

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JUDGMENT

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 the plaintiff, Joseph W. Bowers, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM