

REC'D APR 16 2004

IN THE NEBRASKA WORKERS' COMPENSATION COURT

HORACE HARN,)	DOC: 203	NO: 0075
)		
Plaintiff,)		
)		
vs.)	A W A R D	
)		
DRIVERS MANAGEMENT, INC.,)		
)		
Defendant.)		

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APR 15 2004
NEBRASKA WORKERS'
COMPENSATION COURT

APPEARANCES:

Plaintiff: James R. Harris
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Defendant: Daniel R. Fridrich
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This cause came on for hearing before the Nebraska Workers' Compensation Court at Lincoln, Lancaster County, Nebraska, on August 25, 2003, on the petition of the plaintiff, answer of the defendant and on the evidence, Judge John R. Hoffert, one of the judges of said court, presiding. Plaintiff appeared in person and was represented by counsel. Defendant was represented by counsel. Testimony was taken, evidence adduced, cause submitted with receipt of exhibits post-trial and briefs of parties post-trial, and the Court being fully advised in the premises, finds as follows:

Prior to the formal presentation of evidence, the parties were able to reach several stipulations; to-wit: (1) that the plaintiff was employed by the defendant on the date of his alleged accident of December 29, 2001; (2) that on the date of his alleged accident the plaintiff was earning an average weekly wage of \$684.87; (3) that both venue and jurisdiction are proper; and (4) that should the Court enter an award on plaintiff's behalf, the defendant ought to be given credit for disability payments previously made to the plaintiff by the defendant, i.e. \$474.73 per week for the time period of January 21, 2002 through August 4, 2002, or 28 weeks.

The plaintiff offered into evidence Exhibits 1 through 15; 28-29 and 33-34 (the latter two exhibits being offered post-trial with leave of Court). The defendant objected to the index sheet to plaintiff's exhibits; specifically that section which refers to the examination conducted by Dr. Paul C. Lorenzen as a "defense exam." Defendant argued that such a description was an improper characterization and, thus, was irrelevant. The Court overruled the defendant's objection. The defendant also objected to Exhibit 7 (D) and (E), arguing that each of the bills set forth lacked foundation and relevance. The Court took the objections under advisement pending review of the evidence and, having done so, the Court hereby sustains said objections. The defendant also objected to Exhibits 8 and 14, arguing that the medical reports were not timely disclosed and, thus, prejudiced the defendant. In view of the Court's decision to allow the defendant to produce rebuttal evidence post-trial, the defendant's objections were overruled. Additionally, the Court would note that any objections made by the parties as set forth in the deposition of Dr. Paul Lorenzen (E33-received post-trial), are hereby overruled. In summary, the Court receives into evidence plaintiff's Exhibits 1 through 15; 28-29 and 33-34 (except for the objections sustained to Exhibits 7(D) and 7 (E), as noted above.)

The defendant, in turn, offered into evidence Exhibits 18 through 27 and 35 (received post-trial). The plaintiff objected to Exhibit 18, citing a lack of relevance. The Court overruled the objection. Any and all objections set forth in defendant's Exhibit 35, whether made by plaintiff or defendant, are also overruled. Consequently, the Court received into evidence defendant's Exhibits 18 through 27 and 35.

I.

Given the stipulations entered into by the parties, the first issue for the Court to resolve at trial is whether or not the plaintiff suffered an accident and injury arising out of and in the course of his employment with the defendant on December 29, 2001. The plaintiff testified credibly that while unloading a trailer on said date, a case of bleach fell and struck him on the head. The plaintiff's representations to the Court were corroborated in the recorded history he provided to the various medical healthcare providers seen shortly after the accident (E5, p.2) (E5, p.38) (E1, p.9; lines 4-14). The defendant offered little to no evidence to seriously challenge the occurrence of the accident itself. In the end, the Court is satisfied that the plaintiff did, in fact, suffer an accident arising out of and in the course of his employment on December 29, 2001.

To say that one has proven the existence of an accident does not necessarily infer that one has also suffered a compensable injury as a result thereof. That half of the equation must also be satisfied. The burden of proof and persuasion in this regard certainly lies with the plaintiff. Pocevicious v. Armour and Company, 185 Neb. 668 178 N.W.2d 265 (1970). The plaintiff has alleged in his petition and/or at trial that he sustained injuries to the neck and low back with resulting depression, closed head injury and post-traumatic stress disorder. These conditions are by their very nature not readily observable and thus are "subjective" in nature. Consequently, it is necessary that

the plaintiff present an expert's opinion sufficiently definite and certain so as to casually connect his alleged injuries to the subject accident. Riha v. St. Mary's Church and School, Inc., 209 Neb. 539, 308 N.W.2d 734 (1981).

It is this issue which has proven to be, perhaps, the most decisive to the parties. Various medical records and opinions from a variety of medical experts have been introduced into evidence by both parties. The Court has carefully and critically evaluated all of these exhibits. That exhaustive analysis has led the Court to the conclusion that the plaintiff did, in fact, suffer injuries to his neck and low back with resulting depression owing to the subject accident. The Court, however, rejects the suggestion that the plaintiff suffered either a closed head injury or post-traumatic stress disorder.

The medical causation opinions tendered by various experts fully support the plaintiff's claim of injury(ies) to his neck and low back. Dr. Thomas Stanley, opined in a report of March 21, 2002, that "Mr. Harn experienced an injury where his head was struck with the case and had resultant neck and back pain." (E3, p.4). Dr. Paul C. Lorenzen also provided an opinion indicating a causal nexus between the plaintiff's low back complaints and the blow sustained to his upper body in December of 2001 (E6, p.12). Finally, the Court is presented with the causation opinion tendered by Dr. Rajesh Kumar, who also tied the plaintiff's complaints of cervical and lumbar pain to the accident of December 29, 2001 (E14, p.2).

The defendant, to be sure, was able to offer evidence to suggest that the plaintiff had, indeed, suffered from some degree of neck and low back pain prior to the subject accident. However, as the Court reviews the medical records offered in support of defendant's contention, it would appear that plaintiff's prior complaints were remote in time and were not otherwise disabling to any degree. Restated, the evidence suggests that plaintiff made no complaints during the approximately two years which preceded the subject accident date. Additionally, there was no corroborative evidence to suggest that the plaintiff took any type of pain medication for his back or neck in the two year period prior to the accident at issue. Finally, it was relevant to the Court and persuasive that there was no evidence to indicate that the plaintiff operated in his trade under any type of limitations or restrictions in the period prior to the December 29, 2001 accident. Hence, while the defendant was able to raise various doubts regarding plaintiff's proof of causation, in the end the Court was reasonably satisfied that the plaintiff carried his burden of proof relative to his claimed neck and low back injury.

The Court now turns its attention to the plaintiff's claim of closed head injury, post-traumatic stress disorder and/or depression. The medical or psychological opinions of various experts have been tendered for the Court's review. After a critical analysis of that evidence, the Court is reasonably satisfied that the plaintiff has proven that he suffered from some degree of depression owing to the physical injuries attributable to the December 2001. The Court was persuaded by the opinions offered by Dr. Nick A. DeFilippis, as detailed in his reports to be found at Exhibits 6 and 20. Dr. DeFilippis curriculum vitae indicates that he is well trained and qualified to render the

opinions set forth in his reports. The Court would also note that it was particularly impressed with his rebuttal to the opinions tendered by the plaintiff's expert, Dr. Riss (E20). In other words, the Court rejects the notion that the plaintiff suffers from post-traumatic stress disorder or a closed head injury (as proposed by Dr. Riss) opting instead to accept the diagnosis rendered by Dr. DeFilippis that the plaintiff suffers from resulting depression.

In summary, the Court finds that the plaintiff has carried his burden of proof and persuasion as to both accident and injury. Specifically, as noted above, the Court finds that the plaintiff sustained an accident arising out of and in the course of his employment on December 29, 2001. The Court further finds that the plaintiff has satisfied the Court that he suffered injuries in the subject accident; specifically, an aggravation of his pre-existing degenerative disc problems in his neck and low back, along with depression occurring as a result of the aforementioned injuries.

II.

Having found a compensable accident with resultant injuries, it is next incumbent upon the Court to address the plaintiff's entitlement to temporary disability benefits. From the Court's review of the evidence, it is reasonably clear that the plaintiff was initially taken off work by his treating chiropractor, Dr. Saia, commencing on January 21, 2002 (E8B, p.5). On March 1, 2002, the plaintiff was referred to a neurologist, Dr. Stanley, and ordered to stay off of work (E8B, p.5). The plaintiff was, again, seen by Dr. Stanley on March 21, 2002, and was deemed temporarily totally disabled by Dr. Stanley until he ultimately pronounced the plaintiff at maximum medical improvement on July 25, 2002 (E1, p.83; line 24 - p.84; line 8) (E1, page 72; lines 2-16). Hence, the Court finds that the plaintiff was temporarily totally disabled, owing to his neck and low back problems for the time period referenced above; or 26.5714 weeks. Based upon the stipulated average weekly wage of \$684.87, the plaintiff is entitled to \$456.58 for each of the aforementioned weeks of temporary total disability.

The Court next turns its attention to plaintiff's claim for ongoing temporary total disability benefits owing to his mental injury. The Court, as noted above, has elected to credit the psychological opinions offered by Dr. Nick DeFilippis, as opposed to plaintiff's expert, Dr. Riss. The Court believes that his critique of the opinions offered by Dr. Riss was particularly credible and persuasive. Additionally, the Court was persuaded by the impressive curriculum vitae accompanying Dr. DeFilippis' reports. The inconsistencies found in the history provided to Dr. Riss, as opposed to that which plaintiff gave Dr. DeFilippis is also noteworthy (E20, p.2). In sum, the Court finds that the depression which the plaintiff suffers is related to his underlying pain complaints as noted by Dr. DeFilippis (E6, p.7).

While Dr. DeFilippis defers the ultimate issue regarding the relationship between the plaintiff's depression and the accident of December 29, 2001, to Dr. Lorenzen, the Court (as detailed below) rejects Dr. Lorenzen's "six week theory" on causation. With regard to the task of defining

plaintiff's periods of temporary total disability, the Court accepts the conclusion of Dr. DeFilippis that the plaintiff's depression is not disabling at this juncture. Specifically, this expert concluded as follows:

From a psychological and neuropsychological standpoint, there is no reason why this patient would not be able to go back to work at this time. The main issue is his complaint of pain. Again, the testing does not reveal evidence of post-traumatic stress disorder and there are no significant cognitive problems present that would preclude his returning to work (E6, p.7).

In summary, the Court, therefore, makes no separate provision for any award of temporary total disability owing to the plaintiff's mental injury. The periods of temporary total disability awarded above relate solely to the plaintiff's physical injuries.

The Court now writes separately to address the "six week theory of causation" advanced by Dr. Lorenzen. The Court found the proposition unpersuasive given the fact that the theory is advanced in a vacuum. In other words, little or no consideration was given to the circumstance of the plaintiff in particular. While all the experts agree that the plaintiff had a pre-existing arthritic condition in his spine, it strains credibility to suggest that the aggravation caused by plaintiff's accident simply and abruptly ended six weeks after said accident. There is little to no discussion advanced as to what physically accounted for this apparent presumption of a return to base line. Is it to be suggested that it is a fortuitous circumstance that the plaintiff's accident related back problems ended, and his previously dormant arthritic condition evidenced itself on the very day his accident related problems presumably ended? What evidence supports the apparent proposition that these two unrelated conditions (per Dr. Lorenzen) dovetailed so neatly? Under this theory, there is no allowance whatsoever for the individual who does not fit within the expected norm of recovery, i.e. six weeks post-accident. Absent some discussion relating to this individual in particular, the Court simply cannot credit Dr. Lorenzen's opinion in this regard. His reasoning process and the defense of his position as articulated in his deposition (Exhibit 33), simply left the Court unconvinced.

III.

The next issue concerns the determination of the plaintiff's permanent disability from the subject accident and injuries. As a matter of preliminary interest, the Court would note that it finds no persuasive evidence to suggest that the plaintiff has suffered any permanent impairment or disability owing to his depression. The evidence as presented at trial simply does not serve to sustain any such finding. As noted previously, the Court has accepted the opinions of Dr. DeFilippis and thus finds that the plaintiff was not disabled by his mental condition from returning to work. Hence, there is no separate award made for the plaintiff's claim of mental injury.

With regard to the plaintiff's physical injury, the Court notes that while the opinions offered by Dr. Rajesh Kumar as to a percentage of medical impairment are suspect, such a numerical rating is not a necessity for an award of disability. Swanson v. Park Place Automotive, 267 Neb. 133, 672 N.W.2d 405 (2003). As noted in Swanson, the Nebraska Supreme Court indicated that the rating in and of itself is not the sine qua non of a finding of a permanent medical impairment. Rather, it is the restrictions placed upon the plaintiff owing to his injury which is of significance.

A medical rating given to a plaintiff, of course, is not determinative of the plaintiff's lost earning capacity as the rating is only a measure of the physical impact of the injury upon the plaintiff when considered in a vacuum and not its effect on the injured worker's ability to compete vocationally in the market place. Hence, the nature and extent of the restrictions or limitations necessitated by the physical injury upon the plaintiff himself become of paramount concern as one evaluates his loss of earning capacity from the subject accident.

The Court has carefully and critically evaluated the medical evidence submitted on the issue of plaintiff's limitations and restrictions. Drs. Stanley and Lorenzen indicate that the plaintiff ought not to return to his occupation of truck driving (E1, p.44; line 24-page 45; line 20) (E33, p.55; lines 10-20; the matter of Dr. Lorenzen's opinion as to the underlying cause of restriction having been previously rejected.) (See also opinion of Dr. Kumar to the same effect; E35, p.28; lines 11-17). In addition to these medical opinions, the Court also had the benefit of the plaintiff's own testimony relative to his condition and any attending limitations he suffers. In this regard, the plaintiff attempted to give further definition to the rather general prohibitions advanced by Dr. Kumar of an impaired physical capacity to perform pulling, pushing, lifting, and bending activities (E14, p.2). Mr. Harn testified as to his limited capacity to lift as well as the difficulties associated with sitting for any extended period of time.

There was no court-appointed vocational counselor assigned to assess plaintiff's loss of earning capacity. The parties either could not agree on such an appointment or one was never discussed given the obvious difference between the parties as to permanency of injury and the like. In any event, the Court is certainly free to make that determination without the benefit of any expert opinion. The trier of fact may, instead, rely on the testimony of the plaintiff and associated medical records. Cords v. City of Lincoln, 249 Neb. 748, 545 N.W.2d 112 (1996). Earning power as defined in Sidel v. Travelers Insurance Company, 205 Neb. 541, 288 N.W.2d 482 (1980), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold the employment obtained, and capacity to perform the tasks associated with the work, as well as the ability of the worker to earn wages in the employment in which she or he is working or for which she or he is sued.

Having considered the above criteria from Sidel, along with the plaintiff's educational background, his work history, his injury and the restrictions flowing therefrom, the Court finds the plaintiff's loss of earning capacity to be 35 percent. Given the stipulation of the parties regarding the plaintiff's average weekly wage of \$684.87, the Court finds that the plaintiff is entitled to weekly

permanent disability benefits of \$159.80 (average weekly wage of \$684.87 x 2/3 = \$456.58 x 35 percent = \$159.80). The plaintiff is entitled to payment of said weekly benefits from and after the date of his accident except for those periods of time in which he was entitled to temporary total disability benefits as referenced above. Hobza v. Seedorff Masonry, Inc., 259 Neb. 671, 611 N.W.2d 828 (2000). Said benefits shall be paid for the statutorily mandated 300 week entitlement period, less those weeks of temporary disability previously paid.

IV.

Having found compensability of injury, it necessarily follows that all medical bills incurred in the treatment of said injury should be ordered paid by the defendant. As observed previously, the Court has reviewed the exhibits setting forth plaintiff's outstanding medical expenses (E7) and sustained the defendant's earlier objections to Exhibit 7 (D) and Exhibit 7 (E). The charges set forth in each of said exhibits fails to identify the service for which the billing was incurred and its relationship, if any, to the injuries found to compensable. In other words, the Court is unable to tell from its examination of these two exhibits what relevance they have to plaintiff's physical or mental injuries.

With regard to the remaining billings set forth in Exhibit 7, the Court finds that all of said billings ought to be paid for by defendant except for the charges incurred for plaintiff's Viagra prescription. The Court understands from its examination of the medical evidence submitted that there is, at best, only a temporal relationship between the plaintiff's erectile dysfunction and the injuries at issue. No sufficient persuasive medical evidence was presented to better explain the cause and effect relationship that plaintiff's seeks to draw. The evidence is simply not persuasive.

The plaintiff has requested an order providing for future medical treatment at the expense of the defendant. Section 48-120 provides that, "The employer is liable for all reasonable medical, surgical, and hospital services, . . . appliances, supplies, prosthetic devices, and medicines as and when needed, which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment . . ." The Nebraska Supreme Court has construed this section in such a manner so as to provide that before an order for future medical benefits may be entered, there should be either a stipulation of the parties to that effect or evidence in the record sufficient to support a determination that future medical treatment will be reasonably necessary. Foote v. O'Neill Packing, 262 Neb. 467, 632 N.W.2d 313 (2001).

In reviewing the evidence presented at trial, the Court notes that there is no such stipulation, but that sufficient evidence was produced to support an award of future medical treatment. The Court finds support for its conclusion in this regard given the plaintiff's continuing need for prescription medicine, as well as the suggestion by Dr. DeFilippis that the plaintiff ought to take anti-depressant medications as well as attend counseling sessions, as yet undefined. Hence, the Court finds that the defendant ought to pay for all reasonable future medical care and treatment required by the nature of the plaintiff's injuries as provided in Section 48-120.

V.

The next issue presented concerns the plaintiff's entitlement to vocational rehabilitation. Section 48-162.01 (3) of the Nebraska Workers' Compensation Act provides that, "when as a result of the injury an employee is unable to perform suitable work for which he or she has previous training or experience, he or she is entitled to such vocational rehabilitation services, including job placement and retraining, as may be reasonably necessary to restore him or her to suitable employment." The plaintiff has requested vocational rehabilitation benefits. Given the plaintiff's education, employment history, permanent impairment, as well as the uniform belief that the plaintiff is unable to return to his occupation with the defendant, the Court finds that the plaintiff is entitled to a vocational evaluation to determine which particular vocational rehabilitation services may be reasonably necessary to restore him to suitable employment. The nature or extent of any such rehabilitation is, of course, yet unknown.

If the plaintiff desires to be evaluated as to his suitability for vocational rehabilitation, he shall either by letter, telephone, or in person, contact the vocational rehabilitation section of the Nebraska Workers' Compensation Court in Lincoln, Nebraska, within thirty (30) days of the date of this award. The report of any such evaluation shall be filed promptly with the Court and copies thereof, promptly furnished to all parties hereto, whereupon the Court, after affording the parties an opportunity to be heard, may take such action as is further providing in Section 48-162.01. If the plaintiff fails or declines otherwise without reasonable cause to indicate his desire for vocational rehabilitation services in the manner within the time above specified, he shall be deemed to have waived any and all right to such services.

VI.

The Court is now called upon to resolve whether or not the plaintiff is entitled to an award of attorney's fee, penalties, and interest owing to the alleged failure of the defendant to pay benefits in light of the fact that no alleged reasonable controversy existed as to plaintiff's entitlement to same. From the Court's review of the evidence, it is reasonably clear that the defendant did present medical evidence challenging the plaintiff's claim for disability benefits, both temporary and permanent.

The testimony of Dr. Lorenzen (while discounted by the Court) did provide a reasonable basis upon which the defendant could argue that the plaintiff's disability did not extend beyond six weeks post-accident. [The indemnity payments summary submitted by the defendant (E26) indicates that temporary total disability was paid not only for the conceded six week period as advocated by Dr. Lorenzen, but for 22 weeks thereafter.] In the end, the Court is satisfied that a reasonable controversy did exist as to plaintiff's claim for disability benefits extending beyond the six week period referenced above. Again, while the Court rejected the testimony of Dr. Lorenzen, his opinions did, nonetheless, serve to insulate defendant from the requested penalties and attorney's fees.

VII.

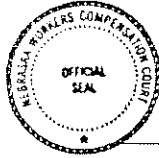
The defendant has paid to and on plaintiff's behalf various disability and medical benefits. Consequently, the defendant is entitled to a credit from the amount of payments made as detailed or otherwise set forth with more particularity in Exhibit 25 and 26.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that:

1. The plaintiff have and recover of the defendant temporary total disability benefits for the time period of January 21, 2002 through July 25, 2002, as referenced in Paragraph II above.
2. The plaintiff have and recover of the defendant the sum of \$159.80 per week for each week from and after the date of his accident for the statutorily mandated period of entitlement, less those weeks during which plaintiff received temporary total disability benefits, for a 35 percent loss of earning capacity.
3. The defendant to pay for and on plaintiff's behalf the medical expenses incurred by the plaintiff as a result of the subject accident and injuries suffered therefrom as provided in Paragraph IV above.
4. The defendant to continue to provide and pay for such future medical care and treatment as may be reasonably necessary as a result of the accident and subsequent injuries as detailed in Paragraph IV above.
5. The plaintiff is entitled to vocational rehabilitation services as provided in Section 48-162.01, the nature of which will be determined by a counselor in accordance with the provisions of Paragraph V above.
6. The defendant is entitled to a credit for payments of indemnity and medical benefits previously made as referenced in Paragraph VII above.

Dated at Lincoln, Lancaster County, Nebraska, on this 5th day of April, 2004.

NEBRASKA WORKERS' COMPENSATION COURT



John R. Hoffert
COPY

JUDGE

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Award was sent by ordinary United States mail, first class postage prepaid, on this 5th day of April, 2004, addressed as shown below, to the following:

James R. Harris
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P.O. Box 30886
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Daniel R. Fridrich
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P.O. Box 45308
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A handwritten signature in cursive script, appearing to read "Kay Peterson", is written over a horizontal line.

Clerk, Nebraska Workers'
Compensation Court

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