

REC'D JUL 02 2004

IN THE NEBRASKA WORKERS' COMPENSATION COURT

ALTON MORRIS,)
)
Plaintiff,)
)
vs.)
)
)
DRIVERS MANAGEMENT, INC.,)
)
Defendant.)

DOC: 202 NO: 0819

AWARD

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JUL - 1 2004

NEBRASKA WORKERS'
COMPENSATION COURT

APPEARANCES:

Plaintiff: James R. Harris
Harris Law Offices
3400 'O' Street
P. O. Box 30886
Lincoln, NE 68503-0886

Defendant: John W. Iliff
Gross & Welch
2120 South 72nd Street, Suite 1500
1500 Omaha Tower
Omaha, NE 68124-2342

This cause came on for hearing March 17, 2004.

Prior to October 4, 2000, plaintiff was diagnosed with coronary artery disease. In 1997 plaintiff underwent angioplasty with stint implants. In 1998 plaintiff had a coronary artery bypass graft. Plaintiff returned to work for defendant in May of 1998. It should be noted that plaintiff is also a non-insulin dependant diabetic and takes glucophage for his diabetes. Records also disclose that plaintiff had knee surgery in 1988 or 1989.

On or about April 15, 2000, plaintiff injured his low back when he was unhooking a trailer. On April 20, 2000, plaintiff was examined by Dr. Craig Duhon at Lake Pointe Orthopaedic Associates (E34). Plaintiff complained of a pain without radiation and was tender over the lower lumbar spine. Dr. Duhon examined plaintiff and his impression was lumbar strain. Plaintiff was referred to physical therapy. He was also given medication. Plaintiff participated in physical therapy and continued to complain of lower back pain. On June 19, 2000, Dr. Duhon referred plaintiff to Dr. R. David Bauer at the Garland Spine Center.

On July 3, 2000, plaintiff was examined by Dr. Bauer (E35). Plaintiff had back pain with no leg pain, no numbness and tingling, and no weakness. Dr. Bauer examined plaintiff and his assessment was idiopathic back pain, degenerative changes lumbar spine, and morbid obesity. An MRI was ordered. On July 20, 2000, plaintiff returned to Dr. Bauer who reviewed the MRI. Dr. Bauer noted that "the patient has very degenerative spine. He has moderate to severe spinal stenosis at multiple levels. There is facet arthrosis." Plaintiff had only back pain rather than leg pain. The severe spinal stenosis did not explain plaintiff's symptoms. Progressive physical therapy was ordered (E36).

Plaintiff participated in physical therapy and in a note dated on or about August 21, 2000, (this is the date on the fax) the physical therapist wrote that plaintiff was able to complete therapy for 1½ hours, 3 times a week without complaints of pain. "High intensity workload." Plaintiff was lifting 280 pounds with leg press and 160 pounds with back extension with no complaints of pain. Plaintiff reported doing housework such as cleaning the garage with no complaints of pain, only fatigue (E22).

Plaintiff was discontinued from physical therapy. On August 22, 2000, plaintiff returned to Dr. Bauer (E37). Physical therapy was complete and plaintiff had a significant improvement in function. Plaintiff was able to lift the weights required of him and had no difficulties getting around. Plaintiff was released to work with limited 50 pounds lifting. On August 22, 2000, Dr. Bauer wrote the work comp claims examiner that:

As you know, Mr. Morris is "the victim" of a very degenerated spine. He has done well in physical therapy, and I would anticipate that he would continue to do well. However, before letting him go back at full tilt, I would like to limit him for one month to 50 pounds lifting restriction (E38).

Plaintiff returned to work driving a truck for defendant.

On October 4, 2000, plaintiff was in the sleeper of the tractor/trailer when the driver rolled the truck. Plaintiff testified that he was unconscious until he heard a lady say, "Is anyone alive?" Plaintiff was taken out through the roof of the truck and taken to Carilion Memorial Hospital in Roanoke, Virginia (E1). The x-rays taken at the Carilion Hospital showed no fracture or acute bony abnormality of the cervical spine. The x-rays of the lumbar spine showed fractures of the right transverse processes at all levels. The x-rays of the pelvis were negative. The x-ray of the chest showed multiple right rib fractures involving the posterior aspect of the right fourth, fifth, sixth, seventh, and eighth ribs. There was a small right pleural effusion. The x-rays of the right scapula showed an acute non-displaced transverse fracture through the upper portion of the scapula violating the glenoid fossa. The plaintiff was admitted, was given medication, splints, and physical therapy. Plaintiff was discharged on October 13, 2000, with final diagnosis of multiple rib fractures on the right side, right glenoid neck fracture, intra-articular nondisplaced, and transverse process fracture at the lumbar region (E1, pp. 30 – 32). The discharge instructions noted that plaintiff was "to be

admitted to inpatient rehab. . .to be put on accu-cheks before each meal and before bed, and. . .to have a shoulder sling and a TLSO at his bedside. . .”(E32, p. 67)

Plaintiff was transferred to the Carilion Memorial Hospital Rehabilitation Center where he stayed until October 20, 2000 (E1, pp. 49 –50). The discharge notes from the rehabilitation center show that plaintiff “did very well in therapies wearing his TLSO. He was ambulating independently with a straight cane. His pain was well-controlled with OxyContin, and the patient was medically stable and functionally ready for discharge to his own home with his wife” (E1, p. 50). Plaintiff was to fly home. His functional status at discharge was that he could ambulate with a straight cane 300-400 feet wearing a TLSO for comfort. Plaintiff was to see Dr. Bauer and Dr. Maul his family practice physician.

On November 2, 2000, plaintiff was examined by Dr. Bauer (E3). On examination “patient is alert is oriented. He is sitting in a TLSO. . .Neurologically he is intact. He is ambulating with a cane.” The x-rays showed “transverse process fractures at L1, L2, L3, L4, and at L5.” Plaintiff was to see Dr. Duhon to follow up for his glenoid and rib fractures.

On November 30, 2000, plaintiff returned to Dr. Bauer. Plaintiff was not doing well. Plaintiff complained of a significant amount of pain and had difficulty sitting without the brace. Plaintiff was to return in one month and at that time physical therapy would commence.

On December 28, 2000, plaintiff returned to Dr. Bauer. Plaintiff was out of his brace and physical therapy was started. Dr. Bauer noted, “patient had never been fully released after his prior worker’s injury” (E3, p. 11). Plaintiff went to physical therapy at OccUmed (E5).

On January 30, 2001, Dr. Bauer noted, “Physical therapy was going okay. He says it makes him sore. The patient is using hydrocodone one every six hours. This is a decrease.”

In February 2001 plaintiff was treated for his cardiac disease with an angioplasty and was doing better. On February 27, 2001, plaintiff told Dr. Bauer that his cardiologist had cleared him to return to physical therapy. Bauer noted that he had nothing in writing. There is a note dated March 22, 2002, from the Texas Cardiology Consultants which releases plaintiff to return to work (E17). On March 29, 2001, plaintiff returned to Dr. Bauer with complaints of a fairly significant amount of pain in the back. There had been no changes. Plaintiff had never fully recovered from his original injury, upon which the automobile/truck accident was superimposed. Dr. Bauer referred plaintiff to Dr. Christine Johnson at Physical Medicine and Rehabilitation Clinic.

On April 18, 2001, plaintiff was examined by Dr. Christine Johnson (E8). Plaintiff complained of constant low back pain which was worse when he stood or walked for any period of time. Dr. Johnson examined plaintiff and recommended water based therapy. Plaintiff did not improve with water therapy. Dr. Johnson referred plaintiff back to Dr. Bauer.

On June 7, 2001, plaintiff was examined by Dr. Bauer. Dr. Bauer was advised that the aquatic therapy made plaintiff's pain worse and he stopped doing it. Dr. Bauer noted this is unusual because in his experience aquatic therapy is one of the few things that patients can do. Dr. Bauer noted:

At this time, I am out of further ideas for Mr. Morris. I am releasing him from care. I would like him to obtain any further paperwork from his primary care provider and have his primary care provider supply him with pain medication. If Dr. Duhon is unable or willing to do that, then we will consider referral (E3, p. 10).

On June 20, 2001, Dr. Bauer wrote:

[Plaintiff] has significant degeneration of his lumbar spine, is morbidly obese, and has back pain as well. The [plaintiff] was continuing to have difficulty, was having pain, but had returned to work before the automobile accident, I prefer the roll-over truck injury, of October 4, 2000.

In the semi-trailer roll-over on October 4, 2000, it appears the claimant sustained transverse process fractures of the lumbar spine. These have healed and I believe that his status has reverted to the baseline of his condition. I believe that the reasons that he has not been able to return to work are of his cardiac condition, his morbid obesity, as well as the degeneration of his spine.

I believe that the transverse process fractures are directly caused by the automobile accident. The remaining back pain appears to be from his degeneration and from his body habitus. I feel that there is no further treatment medically reasonable or necessary for these injuries. Mr. Morris reached maximum medical improvement as of his visit of June 7, 2001 (E48).

On September 13, 2001, Dr. Bauer wrote:

The patient had a prior injury before the rollover accident that occurred on October 4, 2000. The patient points out, correctly, that his symptoms did intensify after the rollover. He had been doing well at physical therapy and had in fact returned to work (that is why he got involved in the rollover accident, as he was working!).

Please do not misunderstand the purpose of my letter. In [sic] think that there are several reasons that this injury has not healed, including his poor conditioning, his heart disease, and the injury that occurred. However, without the rollover accident of October 4, 2000, he would probably be in good shape and would not requiring [sic] either pain medication or medical attention at this time (E3, p. 11).

On June 19, 2001, plaintiff was examined by Dr. Greg Maul (E6). Dr. Maul recommended referral to a chronic pain specialist.

On September 19, 2001, plaintiff was examined by Dr. Steven Remer at the American Pain & Wellness Center (E9, p. 15). Dr. Remer's impression was 54 year-old morbidly obese male with persistent low back pain with history of transverse process fractures and multi-level lumbar degenerative disc disease and facet disease with moderate spinal stenosis. An MRI was recommended. An MRI on September 28, 2001, (E10) found:

1. A 5- to 6-mm broad-based disk protrusion at L5-S1 lateralizing slightly more to the left of midline contacting both S1 nerve roots with the left side more affected than the right.
2. Congenital narrowing of the spinal canal from L1 to S1, further attenuated as described. There also appears to be prominent epidural fat present from L3 through S1.
3. Minimal degenerative anterolisthesis of L4 on L5 with a 3- to 4-mm annular bulge and ligamentum flavum hypertrophy. This finding, along with congenital narrowing, narrows the AP diameter of the spinal canal at L4-5 to 4 mm. There is extension of disk and spur into the inferior aspects of both neural foramina with the left side more affected than the right, and some contact of the inferior margin of the left L4 nerve root cannot be excluded.
4. Small anterior and posterolaterally projecting osteophytes at L3-4 with an annular bulge which may minimally exceed the bony margins. The AP diameter of the spinal canal at this level is 5 mm. Some congenital narrowing is also present at this level.
5. The AP diameter of the spinal canal at L2-3 is 8 mm related to posterolaterally projecting osteophytes and congenital narrowing.

Plaintiff returned to Dr. Remer on October 10, 2001 (E9, p. 17). Dr. Remer recommended proceeding with diagnostic/therapeutic lumbar facet injections. Dr. Remer noted, "Obviously with his overall medical status including his heart disease and obesity we would want try and reserve surgical intervention for only if absolutely necessary." The request for lumbar facet injections was denied by defendant. Plaintiff continued to take medications including Norco which is hydrocodone and continued to see Dr. Remer. Dr. Remer continued to recommend lumbar facet injections.

On January 14, 2002, defendant had plaintiff examined by Dr. Wright Singleton. Dr. Singleton reviewed medical records. Dr. Singleton prepared a report which is marked Exhibit 1 attached to his deposition. The deposition of Mr. Singleton is marked Exhibit 52. In the report and in the deposition as corrected, Dr. Singleton believes plaintiff reached maximum medical recovery on January 14, 2002. Plaintiff would require future treatment with hydrocodone. Dr. Singleton wrote:

...a TENS unit may be prescribed, which may possibly remove the need for hydrocodone. . . .Trigger point injections may be performed. . . .Facet injections or other injections, on the other hand, would be for non-work-related causes of back pain such as facet hypertrophy or degenerative osteoarthritis. There is no need for further physical therapy or pain management per se (E52).

Dr. Singleton states that a functional evaluation was performed. I would note that I don't find records for a functional capacity evaluation or a functional capacity assessment, as we know those. It is Dr. Singleton's opinion that plaintiff may return to work "at Medium duty capacity allowing a 50-pound maximum weight lift and frequent carry of objects weighing 25 pounds." The plaintiff cannot return to work as a truck driver but may work as a supervisor or other role with his prior employer if they can accommodate him in the local office. Dr. Singleton assigned a 5 percent permanent impairment for the low back. In his deposition Dr. Singleton testified that plaintiff could return to work as an employee of the company, as long as he was not behind the wheel of a truck and he could be limited to a 50-pound weight restriction. The plaintiff should not be behind a wheel of a truck because based upon his multiple diagnoses that he had had both the ordinary disease of life conditions and also his recent injury before the truck wreck and also based upon the wreck itself. Dr. Singleton testified that if plaintiff did not have multiple medical problems he would be able to return to work as a truck driver.

On May 28, 2002, plaintiff participated in a functional capacity evaluation (E11). In this functional capacity evaluation the tester found plaintiff demonstrated an ability to work in a sedentary physical demand classification. Recommendations were noted to be:

Based on Mr. Morris history of diabetes, heart disease, severe adipose tissue, chronic complaints of pain and evidence of mental distress I would recommend that Mr. Morris enter an inpatient pain management program. Goals should be geared toward pain control and possible referral to Texas Rehabilitation Commission for job re-education in a Sedentary Physical Demand Classification (E11, p. 1).

On June 3, 2002, plaintiff had another functional capacity evaluation. This functional capacity evaluation was at Liberty Healthcare by Dr. Bryan Weddle a chiropractor. This functional capacity evaluation also found plaintiff was limited to the sedentary work level. Dr. Weddle made two recommendations. The first was for plaintiff to have an examination to determine disability and the second to undergo lumbar injections to help with pain control.

On December 6, 2002, plaintiff returned to Dr. Weddle for an impairment rating (E12, pp. 6-17). Dr. Weddle found plaintiff had a 16 percent whole body impairment and reached maximum medical recovery on December 6, 2002.

On February 10, 2003, plaintiff was examined by Dr. Huntly Chapman at North Texas Spine Care (E13, pp. 2-4). Plaintiff was able to get into see Dr. Chapman because his son, Rusty Morris is a clerk at the Truitt operating room. The purpose of the visit to Dr. Chapman was to obtain an impairment rating. Dr. Chapman found plaintiff to have a 5 percent impairment of the thoracic spine

and an 8 percent impairment of the lumbar spine for a total 13 percent whole person impairment. Dr. Chapman found impairment in the thoracic spine because the plaintiff had multiple rib fractures and associated with those rib fractures, and in reasonable medical probability there had to be quite a bit of tearing of the musculature and the thoracic spine. When it comes to a return to work Dr. Chapman states:

When one reads the Functional Capacity Evaluation from Liberty Healthcare dated 6/3/02, one finds that he fits the federal government for sedentary level function. Therefore, the patient in reasonable probability can do some type of work, but the type of work would most likely be a job in which the patient can determine his own hours, determine what he can and can not do, when he can and cannot rest. The probability of finding such a job is not reasonably probable (E13, p. 6).

In a letter dated February 18, 2004, Dr. Chapman disagrees with the opinions of Dr. Singleton (E13, pp. 7 – 8). Dr. Chapman believes there is a difference in the MRI dated July 12, 2000, and the MRI dated September 28, 2001. Dr. Chapman believes the MRI of September 28, 2001, shows material worsening of plaintiff's lumbar condition.

Dr. Chapman's report of March 14, 2003, was shown to Dr. Remer who agreed with Dr. Chapman that plaintiff has a chronic disability and limitations secondary to work injury. Both Dr. Chapman and Dr. Remer advise future medical care.

On the issue of maximum medical recovery Dr. Bauer, in a report dated June 20, 2001, stated plaintiff reached maximum medical recovery as of June 7, 2001 (E48). Dr. Bauer's notes for the visit on June 7, 2001, show that Dr. Bauer was out of ideas and was releasing him from care. Plaintiff was to obtain paperwork from his primary care provider and have his primary care provider supply him with pain medication (E3, p. 10).

On June 19, 2001, Dr. Maul (E6) recommended referral to a chronic pain specialist. I note that Dr. Bauer wrote on September 13, 2001, (E3, p. 11) that plaintiff's injury had not healed.

Dr. Singleton is of the opinion that plaintiff reached maximum medical recovery on January 14, 2002. The basis for that opinion appears to be a rather cursory functional capacity evaluation. Dr. Singleton does agree with continued medication including hydrocodone for his pain.

There are two valid functional capacity evaluations. There is a functional capacity evaluation on May 21, 2002, by Jay VanAmburgh (E11) and one by Dr. Bryan Weddle on June 3, 2002. Both these functional capacity evaluations indicate plaintiff could work at the sedentary level. I note that in the functional capacity evaluation prepared by J. VanAmburgh that there is a recommendation that plaintiff enter an inpatient pain management program. I note that in Dr. Weddle's evaluation, in addition to lifting limitations and pushing and pulling limitations, the plaintiff also has a low tolerance to steady postures and positions as well as repetitive motion activities (E12, pp. 1 – 4). Dr. Weddle recommended lumbar injections to help with pain control. Dr. Remer has recommended

the injections and those have been denied by defendant.

Dr. Weddle, in a disability report dated December 6, 2002, found plaintiff was at maximum medical recovery on December 6, 2002. I note that the report in Exhibit 12, page 9 shows the maximum medical improvement date of December 6, 2000. This is obviously a typographical error and is corrected by a later letter by Dr. Weddle. Plaintiff seems to agree with Dr. Weddle's finding that he is at maximum medical recovery and was at maximum medical recovery as of December 6, 2002. This is so even though there is a recommendation for injections. I will accept the date of December 6, 2002, as the date the plaintiff reached maximum medical recovery. I do so even though plaintiff needs future medical care consisting of but not limited to the injections recommended by Dr. Weddle and Dr. Remer. I note that Dr. Chapman's view of the MRI's indicate a possible need for future back surgery.

James Rogers and Patricia Conway prepared loss of earning power reports (Es 14, 15, and 56). These reports are based upon various scenarios.

There is no doubt that plaintiff had a preexisting cardiac condition which after surgery resulted in few, if any, limitations. Plaintiff returned to work after cardiac surgery. There is also no doubt that plaintiff had preexisting degenerative disc disease and was able to return to work after the April 2000 injury. Plaintiff also has diabetes and a preexisting knee injury. It is defendant's theory that if plaintiff did not have ordinary diseases of life and multiple medical problems he could return to work as a truck driver which is the opinion of Dr. Singleton and therefore plaintiff has only a 25 percent loss of earning power (E56). In other words, defendant requests that we apportion plaintiff's current disability or loss of earning power between his preexisting condition and the additional disability or loss of earning power caused by the rollover accident. Prior to 1947 § 48-128 allowed apportionment of disability between plaintiff's preexisting condition and disability from a disability due to injuries and an accident arising out of and in the course of employment with an employer. See § 48-128 RS 1943. In 1947 § 48-128 was amended so that an employee who was injured in an accident arising out of and in the course and scope of his employment with an employer would receive full disability payments even though he or she had a previous loss of earning power. After the 1947 amendment to § 48-128 the apportionment of one's loss of earning power or loss of use of a member was between the employer and the second injury fund not the employer and the employee. Since 1947 an employee is entitled to all of his loss of earning power even though he or she may have had preexisting conditions which contributed to the loss of earning power from the injury suffered in the accident arising out of and in the course and scope of employment with an employer. See Heiliger v. Walters & Heiliger Electric, Inc., 236 Neb. 459, 461 N.W.2d. 565 (1990) where the Court stated:

Thus, allocation of disability attributable to a work-related injury and disability attributable to an antecedent or preexisting disability or condition which may or may not be work-related is irrelevant in this case inasmuch as there is no claim against the Second Injury Fund.

It is not proper to allocate or apportion loss of earning power between plaintiff's preexisting conditions and his subsequent condition after the accident. Furthermore, Heiliger v. Walters & Heiliger Electric, Inc. *supra* held that an employee is entitled to full benefits when a preexisting disability or condition combines with a work-related injury to produce disability or loss of earning power for which an employee seeks an award. In this case plaintiff's injuries to his back have resulted in a permanent physical impairment and permanent restrictions which for purposes of workers' compensation benefits will be combined with his preexisting condition to determine his loss of earning power.

Both functional capacity evaluations found plaintiff could work at the sedentary level. The only problem is plaintiff has no transferable skills. Plaintiff's past work history is primarily as a truck driver although he did sell real estate in the 1980's. There is no indication that plaintiff has a license to sell real estate today. When one looks at plaintiff's lifting limitations, the positional limitations and his complaints of pain and his age, education, and experience the plaintiff is permanently totally disabled. Plaintiff meets the definition of an odd lot employee in Schlup v. Auburn Needleworks Inc., 239 Neb. 854, 479 N.W.2d. 440 (1992). Plaintiff is unable to sell his services in a competitive labor market.

Plaintiff is unable to return to his old position as a truck driver. If plaintiff desires vocational rehabilitation services plaintiff shall contact the Court within 30 days after the date this Award becomes final.

Plaintiff requests penalties and attorney's fees. Defendant paid benefits to plaintiff through August 22, 2001. Defendant resumed benefits on December 11, 2001. There is a report from Dr. Bauer stating plaintiff reached maximum medical recovery on June 7, 2001. For this reason I find there is a reasonable controversy as to the payment of benefits and plaintiff is not entitled to penalties or an attorney's fee.

Plaintiff also claims an attorney's fee for failure to pay for hydrocodone also known as Norco which has been prescribed for plaintiff's pain. Even Dr. Singleton does not object to the recommendation that plaintiff take hydrocodone. The exhibits show plaintiff and BlueCross and BlueShield paid for the hydrocodone (E24, pp. 6 - 12). I find plaintiff is entitled to a reasonable attorney's fee of \$1,000.00.

On the medical bills defendant is ordered to pay American Pain & Wellness, PA (Dr. Remer) \$2,115.00. Defendant is to pay drug costs in the amount of \$1,909.81. In the event there is a claimed subrogated interest checks should be made payable to the healthcare provider and/or drugstore the party claiming a subrogated interest and counsel for plaintiff. This will prevent further litigation see Kaiman v. Bergan Mercy Midlands Med. & Dental Plan, 1 Neb. App. 148, 491 N.W.2d. 356 (1992).

Plaintiff is entitled to mileage for 1,404 miles at 32 cents per mile. Defendant shall pay plaintiff \$449.28.

Plaintiff's average weekly wage is \$1,265.86 which entitles plaintiff to \$487.00 per week for temporary total benefits and \$487.00 per week for permanent total benefits. Temporary benefits begin October 5, 2000, and end December 6, 2002. Permanent total benefits begin December 7, 2002.

IT IS THEREFORE ORDERED.

1. Plaintiff have and recover from the defendant the temporary and permanent benefits set forth above.
2. Defendant is given credit for payments made to plaintiff as shown in Exhibit 26.
3. Defendant pay the medical expenses set forth above.
4. Defendant pay plaintiff's future medical care all as required by § 48-120.
5. Plaintiff is entitled to vocational rehabilitation services as set forth above.
6. Plaintiff is entitled to a reasonable attorney's fee of \$1,000.00 to be paid by defendant.
7. Plaintiff is entitled to mileage as set forth above.

Dated at Lincoln, Lancaster County, Nebraska, on this 1st day of July, 2004.

NEBRASKA WORKERS' COMPENSATION COURT



J. Michael Fitzgerald
COPY

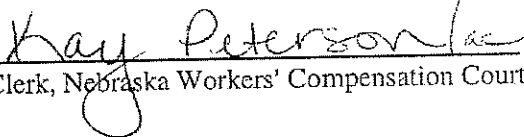
JUDGE

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 1st day of July, 2004, addressed as shown below, to the following:

James R. Harris
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Clerk, Nebraska Workers' Compensation Court