

IN THE NEBRASKA WORKERS' COMPENSATION COURT

DENNIS RAINVILLE,

Plaintiff,

vs.

K & B TRANSPORTATION, INC. and  
LIBERTY MUTUAL INSURANCE  
COMPANY,

Defendants.

DOC: 203

NO: 1788

AWARD

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AND FILED

JUN 13 2006

NEBRASKA WORKERS'  
COMPENSATION COURT

APPEARANCES:

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

Defendants: Scott A. Lautenbaugh  
Nolan, Olson, Hansen, Lautenbaugh & Buckley  
1905 Harney Street, Suite 800  
Omaha, NE 68102

This cause came on for hearing before the Nebraska Workers' Compensation Court at Lincoln, Lancaster County, Nebraska, on March 9, 2006, on the petition of the plaintiff, answer of the defendants 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. Defendants were represented by counsel. Testimony was taken, evidence adduced, and the cause submitted with the receipt of briefs post-trial. The Court, having listened to the testimony presented at trial; having evaluated the exhibits introduced into evidence; having read the respective written submissions of counsel; and being otherwise being fully advised in the premises, finds as follows.

I.

Prior to the presentation of oral testimony, the parties reached several stipulations, as

memorialized in the Order on Pretrial Conference entered by the Court on January 19, 2006, to wit: (1) that on or about February 1, 2002, the plaintiff sustained a personal injury when he slipped and fell on ice while acting in the scope and course of his employment with the defendant employer, K & B Transportation, Inc., in Lyon County, Nebraska; (2) that plaintiff gave timely notice of his accident and injuries as alleged in his petition to the defendants on February 2, 2002; (3) that if called to testify, Dr. Delheimer would state, with a reasonable degree of medical certainty, that the physical restrictions given to the plaintiff, detailed on page ten of his independent medical examination report of October 12, 2004 (E31), were causally related to plaintiff's work-related injuries noted previously; and (4) that both venue and jurisdiction were proper. The Court accepts the stipulations of the parties and so finds.

The plaintiff offered into evidence Exhibits 1 through 25. The defendants objected to Exhibit 21, arguing that it was irrelevant to any issues in contest. The Court overruled the defendants' objections in this regard. The defendants next took issue with the offered Exhibit 24, arguing that it was both irrelevant and contained hearsay. The Court overruled the defendants' objections except for the hearsay objection noting that the statements attributed to Mr. James DeMars in said exhibit were, in fact, hearsay in nature. Hence, the Court received into evidence plaintiff's Exhibits 1 through 25 (except for the hearsay statements noted above and found in Exhibit 24).

The defendants, in turn, offered Exhibits 26 through 34 into evidence. The plaintiff objected to Exhibit 28, page two, arguing that the psychological opinions offered by vocational rehabilitation specialist, Ron Schmidt, lacked proper and sufficient foundation. The Court was in agreement in this regard and sustained the objection to those portions of page two of Exhibit 28 which contained Mr. Schmidt's opinions on the psychological health of the plaintiff. No other objections were tendered by the plaintiff to defendants' exhibits. Consequently, Exhibits 26 through 34 were received into evidence except for those passages noted above and found in Exhibit 28. [With regard to any objections set forth in the deposition transcripts offered into evidence, they are all overruled except for those specifically sustained at trial.]

## II.

Given the stipulations entered into by the parties as to plaintiff's employment, occurrence of accident, and notice of same given by plaintiff to defendants as soon as practicable, the first issue for the Court to resolve at trial is the matter of plaintiff's average weekly wage. The evidence presented indicates that the plaintiff worked for K & B Transportation but for a short period of time prior to his accident of February 1, 2002. Nonetheless, the Court is reasonably satisfied after hearing the testimony of both employee and employer, as well as reviewing Exhibit 20 (a copy of the ad that memorialized the terms of defendant's employment offer), that the plaintiff earned an average weekly wage of \$766.06 at the time of the stipulated accident.

Plaintiff's wage statement indicates that he worked less than two weeks for the defendant employer at the time of his accident. The statement of earnings contained in Exhibit 19 indicates that the plaintiff earned \$345.18 during his first week of employment (a partial week owing to the fact that plaintiff attended an orientation session for two days without pay) and \$766.00 during his first full week of employment with K & B Transportation. The Court has chosen to treat the first week of employment as abnormally low and unrepresentative of plaintiff's expected wage. See generally, Canas v. Maryland Casualty Co., 236 Neb. 164, 459 N.W.2d 533 (1990). [Credibility is added to the Court's conclusion in this regard owing to the fact that the terms of employment, as established by Exhibit 20 and the testimony of the parties, indicates that plaintiff was to be guaranteed \$ .30 a mile for a minimum of 2500 miles per week.] Hence, the Court concludes that the plaintiff had an average weekly wage at the time of his accident of \$766.00.

### III.

The Court next turns its attention to the issue of determining the extent and nature of any injuries suffered by the plaintiff in the stipulated accident. The Court has carefully reviewed and evaluated the numerous and voluminous medical records introduced into evidence by the parties. That exercise has led the fact finder to conclude that plaintiff has established that he suffered both physical and psychological injuries in the subject accident.

With respect to the physical side of the injury equation, the Court observes that there is little dispute but that the plaintiff suffered a disk herniation at L4-5 in the accident of February 1, 2002. Indeed, Dr. Quentin Durward, a neurosurgeon, recommended same day surgery after reviewing plaintiff's MRI. In his operative summary, Dr. Durward noted:

The patient had moderately severe bilateral lateral recess and foraminal stenosis at L4-5. There was a huge central herniated and extruding disk with two free fragments in the canal severely compressing the dural sac bilaterally at below L4-5 (E3, p. 9).

The more persuasive medical evidence also indicates that as a result of the herniated disk and surgery performed thereafter plaintiff suffered significant peroneal nerve palsy of his right foot along with developing a neurogenic bladder. The Court concludes that each of these physical ailments, the herniated disk and the complications flowing from the surgery to include the dropfoot and bladder difficulties, resulted from the accident and injuries sustained on February 1, 2002. In reaching this conclusion, the Court relies upon the causation opinions of Dr. Bradley D. Dworsky (E11, p. 6), (E12, p. 12), (E15, pp. 9:22-10:9).

While the burden of proof and persuasion on the issue of causation certainly lies with the plaintiff, the Court notes that the defendants did not offer any medical evidence to seriously challenge the causation opinions of plaintiff's experts. Rather, the thrust of the defendants' approach in its case-in-chief appears to be more directed at plaintiff's credibility relative to any limitations or

restrictions flowing from his physical injuries. In sum, the Court concludes, as noted above, that plaintiff has persuasively shown that he suffered an injury to his low back with resulting dropfoot and urinary incontinence.

In addition to his physical injuries, the plaintiff has also made claim for a psychological or mental injury as well. To assist the Court in its analysis of the relationship, if any, between plaintiff's psychological condition and the work accident, the parties have offered the expert opinions of Dr. Roger Riss and Mr. Robert E. Lewis. Each expert was deposed and subject to cross examination regarding their beliefs. The Court has carefully and critically evaluated the opinions of these experts and concludes that the greater weight of the evidence supports plaintiff's assertion that he suffers from a psychological condition flowing from the accident and injury to his back.

The testimony of Dr. Riss was viewed as both credible and persuasive. In his deposition he was quite emphatic about the causal nexus between plaintiff's psychological condition and the subject accident and injuries:

Q: Let me ask you to, in effect, Dr. Riss, just to sum-up one more time in conclusion, then, your opinions to a reasonable degree of psychological certainty as to the causal relationship between the work injury of February 1, 2002, and Mr. Rainville's current psychological diagnosis—

A: Yes.

Q: -- and resultant challenges to employment that you have outlined in your report.

A: Right, right. And, you know, I think I can very clearly say that there's a direct relationship between the events of February 1, 2002, Mr. Rainville's response to those events and perceptions about those events, and his current work readiness.  
(E13, pp. 58:12-59:1).

Further support for a finding of causation can be gleaned from the hand-written report of Dr. Benton dated January 10, 2005, wherein she indicated that the plaintiff's psychiatric condition had worsened owing to his chronic pain (E16).

To the extent that it is necessary to so state, the Court found unpersuasive the opinions expressed by Mr. Lewis as to plaintiff's overall psychological make-up (to include his criticism of plaintiff's actions on the day of his accident as being illogic, impractical, and neuropsychologically disturbed [E29, p.2]). In other words, Mr. Lewis appeared more focused upon the plaintiff's soundness of judgment immediately prior to the accident as opposed to the effect of the accident and injuries upon his psychological state, whatever its status, on and after the date of the accident.

Again, the compensability of the accident itself and plaintiff's actions prior thereto are not in question owing to the stipulation of the parties that the plaintiff sustained an accident arising out of and in the course and scope of his employment with the defendant employer. In any event, the defendants' psychological expert simply did not present a credible defense of his opinions sufficient to negate the compelling testimony of the plaintiff's experts.

#### IV.

Having found compensability of plaintiff's physical and psychological injuries (herniated disk, dropfoot, urinary incontinence, and chronic pain leading to psychological difficulties), it is necessary to address the issue of disability, both temporary and permanent. With respect to plaintiff's physical injuries, the Court accepts the opinion of Dr. Dworsky that plaintiff reached maximum medical improvement (MMI) on November 19, 2004 (E11, p. 11). The defendants' examining medical expert, Dr. Steven C. Delheimer, also opined that the plaintiff reached MMI for his physical injuries on November 19, 2004 (E31, p. 10).

With respect to plaintiff's entitlement to temporary disability benefits, the evidence was somewhat sketchy. The Court did its best to reconcile plaintiff's testimony at trial with the written records submitted into evidence. As best the undersigned can construct, it appears that the plaintiff was off work from the date of his surgery on February 15, 2002 (E3, p. 4), through March 5, 2002, at which time plaintiff was given release to return to work (E3, p. 17). Mr. Rainville was again taken off work for additional treatment on March 19 (E3, p. 21), and released to return to work on April 6, 2002 (E3, p. 32). This initial period of temporary total disability, therefore, constituted 5 2/7 weeks.

The plaintiff continued to work for the defendant employer until he was terminated on May 9, 2002 (E34). Mr. Rainville obtained employment thereafter with Lucky Trucking Company, commencing on June 4, 2002, and worked until leaving their employ on July 22, 2003. The Court makes no provision for any award of temporary total disability benefits between plaintiff's termination of employment with K & B Transportation and his commencement of employment with Lucky Trucking Company, finding the evidence less than persuasive that he was so entitled.

The plaintiff testified that he left the employment of Lucky Trucking Company on July 22, 2003, because he felt that his condition was deteriorating as he suffered increases in his pain levels, a higher frequency of spasms, and enhanced urinary problems. Mr. Rainville also indicated that medication simply was no longer proving effective in controlling his symptomatology. His professed inability to continue to engage in the truck driving trade evidenced itself despite the fact that he used an automatic transmission with an automatic safety latch while driving for Lucky Trucking Company. Contemporaneous medical records generated at or around the time of plaintiff's employment with Lucky Trucking confirmed Mr. Rainville's representations at trial.

For instance, in October of 2002, the plaintiff was seen by Dr. Dzung H. Dinh with complaints of deterioration of strength in his right ankle and dorsal flexion as well as very frequent paroxysmal spasms originating from all of the toes up the foot, calf and upper thighs, 20 to 30 times a day, lasting a few minutes (E6, p. 3). The medical evidence adduced also suggests that the plaintiff's mental health was also deteriorating prior to his discontinuance of employment. Mr. Rainville made complaints to the Hines VA Hospital regarding his depression (E8, p. 1). Within one month of leaving Lucky Trucking Company the plaintiff was complaining to his VA physician that he had trouble with urinary incontinence while engaging the pedals on his truck, walking, etc. Mr. Rainville also complained of chronic low-back pain and a feeling of worthlessness, lack of motivation, decreased concentration, and psychomotor agitation (E8, p. 16). The plaintiff testified at trial that his depression seemed to worsen as his physical condition deteriorated. It is further noteworthy that within three weeks of the cessation of employment with Lucky Trucking Company, the plaintiff was diagnosed with depression and treatment was recommended (E8, p. 17). The evidence indicates that the plaintiff continued to treat thereafter for both his physical and mental conditions at the VA from 2003 through the time of trial.

The plaintiff's treatment for his mental injury, however, continued after the date he attained MMI for his physical injuries. Several experts have weighed in on the issue of plaintiff's ongoing disability owing to his mental condition. Indeed, there appears to be shared consensus that the plaintiff's psychiatric condition had worsened owing to his chronic pain (E16—report of Dr. Benton), (E27, p. 39—deposition of Mr. Robert Lewis). Additionally, the various experts opined that the plaintiff was not yet ready to return to suitable or gainful employment given his psychological condition (E13, p. 56—deposition of Dr. Riss), (E27, p. 40—deposition of Mr. Lewis). In sum, the Court finds the more persuasive evidence regarding plaintiff's mental condition to suggest that plaintiff remains temporarily totally disabled.

Given the Court's conclusions, the plaintiff is found to have been temporarily totally disabled for the time period from February 15, 2002, through March 5, 2002; March 19, 2002, through April 5, 2002; and from July 23, 2003, through the date of trial and continuing into the future. In view of the Court's finding of an average weekly wage of \$766.06, the plaintiff is thus entitled to \$510.71 per week for each of the aforementioned weeks of temporary total disability.

## V.

Given the Court's findings regarding the ongoing nature of plaintiff's temporary disability, issues relative to permanent disability benefits and vocational rehabilitation are not yet ripe. While the Court, as noted above, has concluded that the plaintiff has reached a level of stabilization relative to his physical injuries, Nebraska law precludes the assessment of any resulting permanent disability at this point in time. In Rodriguez v. Hirschbach Motor Lines, 270 Neb. 757, 707 N.W.2d 232 (2005), the Nebraska Supreme Court held that:

In other words, even if medical evidence establishes that a claimant's different injuries have different dates of maximum medical recovery, the legally significant date--the date of maximum medical improvement for purposes of ending a workers' compensation claimant's temporary disability--is the date upon which the claimant has attained maximum medical recovery from *all* of the injuries sustained in a particular compensable accident. [citations omitted] We, therefore, hold that a claimant has not reached maximum medical improvement until all the injuries resulting from an accident have reached maximum medical healing.  
(270 Neb. 764-65)

Consequently, the Court defers ruling on the nature and extent of any permanent disability suffered by the plaintiff and his need, if any, for vocational rehabilitation services. Once the plaintiff has reached maximum medical improvement relative to all of his injuries, either party may petition the Court for a determination of these issues if they are, otherwise, unable to agree on the proper resolution of same.

## VI.

Having found compensability of accident and injuries, it necessarily follows that all medical bills reasonably incurred for the treatment of said injuries ought to be ordered paid by the defendants if all necessary foundational elements have been satisfied. Given the lack of objections to the tendered bills, along with the testimony presented at trial and the medical reports introduced into evidence, the Court finds that said billings (E22) ought to be ordered paid by defendants. [The defendants requested leave of Court to submit a fee schedule audit of Exhibit 22 but notified the Court on May 3, 2006, that no additional exhibit would be forthcoming.]

The plaintiff has requested an award of future medical benefits. 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. Footte v. O'Neill Packing, 262 Neb. 467, 632 N.W.2d 313 (2001).

In viewing the evidence presented at trial, the Court notes that there was no such stipulation but that sufficient evidence was produced to support an award of future medical benefits. Dr. James R. Pelton, in a letter addressed to plaintiff's counsel dated December 8, 2005, opined that various prescription medications would be needed by the plaintiff as a result of his work accident of February 1, 2002 (E17). Additionally, the Court notes that several medical experts have indicated that plaintiff's psychological condition may well be relieved, or ameliorated, by treatment at a pain management facility. Dr. Roger Riss specifically noted that he felt that Mr. Rainville would be an appropriate candidate for participation in an intensive multi-disciplinarian pain treatment program such as the Integrative Pain Treatment Center at Marianjoy Rehabilitation Hospital in Wheaton, Illinois (E12, p. 9). Similarly, Dr. Bradley D. Dworsky also opined that the plaintiff's chronic pain would best be served with treatment by a pain management service (E11, p. 6).

Consequently, the Court believes that there was sufficient evidence adduced to support the requested award of future medical benefits, to include plaintiff's enrollment in the suggested pain management program. Thus, any future medical treatment received by the plaintiff which falls under the provisions of § 48-120, and which otherwise satisfies all necessary foundational elements thereto, should be provided at the expense of the defendants.

## VII.

The plaintiff has requested an award of attorney's fees and interest owing to defendants' failure to pay various medical bills submitted by plaintiff to defendants for payment. Specifically, plaintiff seeks the requested assessment of fees as they relate to medical billings incurred prior to October 12, 2004. Counsel for plaintiff suggests that any billings submitted after that date were subject to a reasonable controversy regarding defendants' obligation to pay same given the opinions of Dr. Delheimer (E31). In his report of October 12, 2004, Dr. Delheimer does, indeed, affirmatively set forth his belief that no further treatment is necessary owing to the January 2002 [sic] accident.

At first blush, the plaintiff's request for an award of attorney's fees would seem to have merit. However, it is a precondition for any such award that the employer or its insurer be provided 30 days notice of its obligation for any such medical payments. Neb. Rev. Stat. § 48-125(2). The Court has carefully reviewed its trial notes and the exhibits tendered and fails to find that any such notice was proven. Indeed, in response to plaintiff's Request for Admissions, the defendants expressly deny receipt of the subject billings (E21, p. 3). A review of the bills themselves indicates that they were sent only to the plaintiff or plaintiff's counsel (E22). The few bills which seemingly identify an employer reference the name of "Western Livestock," and not the named employer herein (E22, pp. 35-52).

Consequently, the Court respectfully declines to enter any award of attorney's fees or interest owing to an alleged failure by the defendants to pay outstanding medical bills in the prescribed period of time.



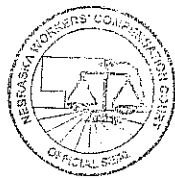
VIII.

The defendants have paid to and on plaintiff's behalf various medical and disability benefits. Reference to the fact of payment was made in defendants' Pretrial Statement as well as in the lay testimony of plaintiff. Hence, the defendants' are entitled to a credit in the amount of any such payments made.

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

1. Plaintiff have and recover of the defendants temporary total disability benefits in the amount of \$510.71 for the periods of time set forth or otherwise identified in paragraph IV above.
2. The defendants to pay for the medical bills incurred by the plaintiff in the treatment of his injuries, both physical and psychological, as further detailed in paragraph VI above.
3. The defendants to continue to pay for such future medical care and treatment as is shown to be reasonable, necessary and causally related to the injuries suffered by the plaintiff as referenced in paragraph VI above.
4. The defendants are entitled to a credit for the payment of medical and disability benefits previously made as stated in paragraph VIII above.

Dated at Lincoln, Lancaster County, Nebraska, on this 15<sup>th</sup> day of June, 2006.



NEBRASKA WORKERS' COMPENSATION COURT

John R. Hoffert  
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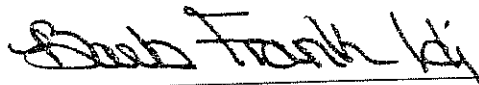
JUDGE

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 15<sup>th</sup> day of June, 2006, addressed as shown below, to the following:

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Clerk, Nebraska Workers' Compensation Court