

IN THE NEBRASKA WORKERS' COMPENSATION COURT

DAVID FRANKS,)	DOC: 204 NO: 0521
)	
Plaintiff,)	
)	
vs.)	AWARD
)	
CRETE CARRIER and TRANSPORTATION CLAIMS, INC.,)	
)	
Defendants.)	

APPEARANCES:

Plaintiff: Martin V. Linscott
Linscott Law Office
2776 South Street
Lincoln, NE 68502

Defendants: Jack A. Dike
David L. Brown
P.O. Box 83246
Lincoln, NE 68501-3246

This cause came on for hearing before the Nebraska Workers' Compensation Court at Lincoln, Lancaster County, Nebraska, on January 25, 2005, 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, cause submitted with receipt of evidence post-trial and briefs post-trial. The Court having listened to the testimony presented at trial: having reviewed the exhibits adduced into evidence; having read the respective arguments of counsel; and being otherwise fully advised in the premises, finds as follows.

I.

Prior to the presentation of evidence, the parties were able to reach several stipulations, to-wit: (1) that the plaintiff was employed by the defendant, Crete Carrier Corporation, on the date of his accident of April 10, 2003; (2) that the plaintiff indeed suffered an accident and injury arising out of and in the course and scope of his employment on April 10, 2003; (3) that the plaintiff gave notice of his accident as soon as practicable after the occurrence of same; (4) that at the time of his accident, the plaintiff was earning an average weekly wage of \$843.87; (5) that the defendants had paid \$22,918.85 to

plaintiff as temporary total disability for the period of April 17, 2003, through February 6, 2004, at the rate of \$542.00 per week; (6) that prior to trial the defendants had paid \$6,991.33 as permanent partial disability benefits to the plaintiff for the period of February 7, 2004, through January 19, 2005, at the rate of \$140.63 per week (based upon the average weekly wage of \$843.87 x 2/3 x 25 percent assumed whole body impairment); (7) that the defendant/employer provided plaintiff with timely notice of his right to choose a physician by providing him with a form for making the selection as required by Section 48-120; (8) that the plaintiff made an initial choice of physician, i.e. Anthony Ferrara, D.C. of the Aaragon Chiropractic in Lawton, Oklahoma; (9) that both venue and jurisdiction were proper.

The plaintiff offered into evidence at the time of trial Exhibits 1 through 32. The defendants had no objection to the tendered materials. Consequently Exhibits 1 through 32 were received into evidence. The plaintiff requested leave of Court to submit Exhibit 43 post-trial. Said exhibit was received on or about January 27, 2005, and consisted of a clinic note from the medical offices of Dr. Isaza memorializing the plaintiff's most recent medical visit prior to trial. The defendants had no objections to the plaintiff's request nor the receipt into evidence of Exhibit 43. Hence, Exhibit 43 was also received into evidence.

The defendants, in turn, offered Exhibits 33 through 40 and 42 into evidence at the time of trial. The plaintiff had no objections to the defendants' offered exhibits. Consequently, Exhibits 33 through 40 and 42 were received into evidence. The defendants also requested leave of Court to submit Exhibit 44 post-trial. Exhibit 44 essentially consists of a fee schedule audit of a billing from Dr. Isaza. The plaintiff had no objection to the defendants' request nor registered any objection to the receipt of Exhibit 44 into evidence. Hence, Exhibit 44 was also received. [For the benefit of the reader and any reviewing appellate court, there was no Exhibit 41 offered into evidence by either party.]

II.

Owing to the various stipulations entered into by the parties, the first issue for the Court to resolve at trial is a determination of the nature and extent of the injuries suffered by the plaintiff in the stipulated accident of April 10, 2003. The Court has carefully and critically reviewed the medical evidence submitted and concludes that the plaintiff incurred injuries to his low back and neck in the subject accident. The Court also observes further that the defendants admitted that the plaintiff sustained said injuries and the accident of April 10, 2003 (Answer of defendants, Paragraph 2). Additionally noteworthy is the fact that Dr. Jorge Isaza opined that there was a causal connection between the plaintiff's low back injuries and the accident of April 10, 2003 (E6).

As the Court understands the plaintiff's lay testimony and the medical records introduced into evidence, the primary injury which plagues him concerns his low back. The neck injury was not the subject of any sustained or otherwise intensive medical treatment. If the plaintiff intended to show that he sustained any kind of temporarily disabling or permanent injury owing to the neck complaints, the evidence submitted on his behalf simply is not persuasive in this regard. Hence, the Court will confine its inquiry to the low back injury and the issues necessarily related thereto.

III.

The next issue presented for decision concerns the plaintiff's entitlement to temporary total disability benefits owing to his low back injury as incurred in the accident of April, 2003. It is this issue perhaps more than any other that has proven to be the most divisive between the parties. The plaintiff asserts that he has been temporarily totally disabled from April 17, 2003, up to the time of trial and continuing into the foreseeable future. The defendants, on the other hand, contend that the plaintiff reached maximum medical improvement (MMI) as of April 6, 2004. The Court finds that the medical evidence when

considered as a whole tends to favor the plaintiff's position and not that of the defendants.

In arguing that the plaintiff reached maximum medical improvement on February 6, 2004, the defendants necessarily rely upon the opinion offered in this regard by Dr. Landreneau (E2, p. 11). To be sure, Dr. Landreneau does, indeed, indicate that the plaintiff is probably at MMI. However, this opinion simply cannot be viewed in a vacuum. A thorough and complete review of the medical evidence establishes that significant medical treatment occurred after the physician's announcement of MMI. Within two months of the date of the opinion touted by the defendants, Dr. Landreneau memorializes the fact that the plaintiff was seen by Dr. Jorge Isaza for a second opinion. Dr. Landreneau also affirmatively acknowledged that he could not "deny" the active treating physician's opinion after his examination.

Indeed, the office note of Dr. Landreneau dated April 30, 2004, lays out five proposed treatment options for the plaintiff (E2, p. 12). One of the suggested options was disc replacement surgery. Dr. Landreneau expressly indicated that if the plaintiff were interested in disc replacement surgery that "I would offer Dr. Jorge Isaza's assistance." (E2, p. 12). Indeed, Dr. Landreneau filled out a slip dated April 30, 2004, providing a Rx (a medical prescription) for an evaluation by Dr. Isaza (E2, p. 14).

Hence, it appears reasonably clear that the preliminary MMI opinion of Dr. Landreneau must be weighed against the historical events occurring after the giving of said opinion. In other words, Dr. Landreneau essentially deferred to Dr. Isaza who ultimately went on to perform surgery upon the plaintiff. Additionally, one has to wonder about the firmness or conviction attending Dr. Landreneau's opinion on MMI when one considers that one month later in a letter addressed to plaintiff's counsel he indicated that "MMI is questionable at this time" (E3, p. 2). In any event, the Court rejects the defendants' contention that the plaintiff reached maximum medical improvement on February 6, 2004, given the surgical procedure performed thereafter as well as the equivocal nature of Dr. Landreneau's opinions as referenced above.

The evidence presented also clearly establishes that the plaintiff has yet to recover fully from his surgical procedure. Exhibit 43, as provided post-trial, indicates that as of plaintiff's last examination on January 19, 2005, the plaintiff was still treating and in need of further diagnostic testing (MRI). Indeed, the last reference by Dr. Isaza relative to the plaintiff's capacity to return to work indicates that Mr. Franks was unable to do so (E5, p. 21-Return to Work Slip dated January 19, 2005, indicating that the plaintiff was "unable to return to work at this time").

In their post-trial brief to the Court, the defendants go to some lengths to attack the plaintiff's credibility and character in general. Specifically, the Court is urged when considering the testimony of the plaintiff to remember that the plaintiff allegedly "worked a fraud upon the State of Oklahoma when he took affirmative action to renew an Oklahoma license when he knew that he had established legal residence within Louisiana. (Brief of defendants, Page 1-2). The Court is then asked to take judicial notice of various federal statutes and regulations as well as state statutes for the states of Louisiana and Oklahoma. The Court respectfully declines to do so as the request to take said judicial notice occurred after the close of evidence (except for the two exhibits specifically referenced at trial and identified as Exhibits 43 and 44). Furthermore, the Nebraska Supreme Court has interpreted the Uniform Judicial Notice of Foreign Law Act, Section 25-12101 et seq., to mean that a proponent must give reasonable notice in pleadings or otherwise of their intention to request that the Court take judicial notice of the law of another state and it must be plead. See generally, Smith v. Brooks, 154 Neb. 93, 47 N.W.2d 389 (1951), Scott v. Scott, 153 Neb. 906, 46 N.W.2d 627 (1951).

In any event, the questioning of the plaintiff's credibility or character is of limited probative value. The objective evidence of injury as confirmed by the diagnostic tests performed by various

medical professionals and the lack of any common thread of concern over the plaintiff's veracity in the reporting of his symptoms serve to negate the overall relevance of the defendants' expressed concerns over plaintiff's alleged licensing improprieties.

Given the stipulation of the parties that the plaintiff earned an average weekly wage of \$843.87, the plaintiff is thus entitled to the statutory maximum benefit of \$542.00 per week then in effect for each week from and after April 17, 2003, through the date of trial and continuing into the future so long as the plaintiff remains temporarily totally disabled.

IV.

Given the Court's findings regarding the plaintiff's ongoing temporary total disability status, it is unnecessary for the Court to address issues of permanency of injury or vocational rehabilitation benefits. The obvious lack of evidence with regard to the plaintiff's permanent impairment and restrictions necessarily forecloses any discussion of vocational rehabilitation benefits. *See generally, Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002). *An additional hearing may be required if the parties are unable to resolve the issues of the plaintiff's permanent disability and/or his entitlement to vocational rehabilitation benefits.*

V.

Given the stipulations of the parties as well as the Court's findings detailed above as to the compensability of plaintiff's accident and the injury flowing therefrom, it necessarily follows that all medical billings incurred in the treatment of said injury should be ordered paid by the defendants. Of course, the plaintiff is not relieved of his burden of proving the necessary foundational elements attended thereto, i.e. causation, necessity and reasonableness. The Court has carefully reviewed the medical bills submitted by the plaintiff (E13-31) and finds that said billings are fair, reasonable, and necessarily incurred owing to the injury at issue. The medical evidence submitted as well as plaintiff's lay testimony support this finding.

The Court would specifically note that it rejects defendants' contentions that the surgical billings of Dr. Isaza are not compensable. In light of the affirmative statement or action by Dr. Landreneau regarding the recommended evaluation by Dr. Isaza, the Court refuses to adopt the defendants' suggestion that Dr. Isaza was outside the referral chain and that defendants are thus not liable for his medical billings. [In any event, even if the Court were to adopt the defendants' position, the plaintiff is clearly entitled under Nebraska law to select the surgeon he wishes to perform any major surgical operation, Neb. Rev. Stat. § 48-120(2) (b).]

The payment of said bills, however, is to be made pursuant to the fee schedule audits submitted by the defendants as detailed in Exhibit 40 (the Court has been advised by counsel that pages 1-5 of Exhibit 14 are in error (by indicating an outstanding balance as that bill should correctly be read to have a zero balance.) Payment of the medical expenses ought to be in accord with the Nebraska Supreme Court dictates as provided in Dawes v. Wittrock Sandblasting & Painting, Inc., 266 Neb. 526, 667 N.W.2d 167 (2003). To the extent that the plaintiff has paid any of the covered expenses directly, he should be reimbursed accordingly (see summary of payments made by plaintiff personally as detailed in Exhibit 13). Finally, the plaintiff is to be compensated for the mileage expenses he incurred as detailed in Exhibit 30. The applicable statutory rate in effect at the time of the trips detailed therein is to be applied.

VI.

The plaintiff has requested an award of future medical benefits. Neb. Rev. Stat. § 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 benefits. The Court specifically notes in this regard that Dr. Isaza in his last office note dated January 19, 2005 (E43), indicates an additional MRI of the lumbar spine is needed. Prescriptions for ongoing medication is also detailed in that same clinic note. Consequently, the Court believes that there is sufficient evidence to support the requested award of future medical benefits. Thus, any future medical treatment received by the plaintiff which falls under the provisions of Section 48-120, and which otherwise satisfies all necessary foundational elements thereto, should be provided at the expense of the defendants.

VII.

The defendants have paid to and on plaintiff's behalf various disability and medical benefits. Consequently, the defendants are certainly entitled to a credit in the amount of said payments as detailed or otherwise set forth with more specificity in Exhibit 35 and Exhibit 42. A credit is also allowed for the amounts referenced in the stipulation of the parties as entered into at the commencement of trial, i.e. defendants having paid various amounts of TTD and PPD benefits to plaintiff which plaintiff acknowledged receiving.

VIII.

Lastly, the Court is called upon to resolve the issue of whether or not the plaintiff is entitled to an award of an attorney's fee, penalties and interest owing to the alleged failure of the defendants to pay benefits in light of the fact that no alleged reasonable controversy existed regarding plaintiff's right to same.

From the Court's review of the evidence submitted, it appears that the defendants terminated the payment of TTD benefits on or about February 6, 2004, in reliance upon the opinion of Dr. Landreneau that the plaintiff had reached MMI at that point (E2, p. 11). However, as pointed out by the plaintiff and as noted by the Court, Dr. Landreneau essentially retracted his opinion regarding MMI upon his referral of the plaintiff to Dr. Isaza two months later (E2, p. 12) (E2, p. 14). The fact that the defendants viewed the referral of the plaintiff to Dr. Isaza as being outside the proper "chain of referral" and/or no referral at all is irrelevant. The indisputable truism under Nebraska law is that the plaintiff had the right to choose his own surgeon for the major operation he subsequently underwent (Neb. Rev. Stat. § 48-120(2) (b)). The plaintiff obviously had the recommended surgery and the medical evidence is uncontradicted

that the plaintiff is still recovering from that operative procedure. In other words, the defendants have offered no evidence to suggest that the plaintiff has yet obtained MMI from the low back surgery performed by Dr. Isaza. [The surgery was labeled as necessary and causally related to the subject accident by Dr. Isaza (E6, p. 2). FDA approval of the procedure was also noted. The defendants' offered no persuasive evidence challenging these opinions of Dr. Isaza.]

In sum, the Court finds that the plaintiff's request is supported by the evidence and the law. The defendants terminated the payment of ongoing temporary total disability benefits based upon grounds that were subsequently shown by the evidence to be unreasonable. Thus, the defendants were without a basis upon which to claim immunity from the penalties required by plaintiff.

As referenced in Paragraph III above, the Court found that the plaintiff was entitled to temporary total disability benefits of \$542.00 per week for each week from and after April 17, 2003. The defendants terminated the payment of TTD to the plaintiff on February 7, 2004. At that time they switched the plaintiff to weekly benefits of \$140.63 (as per the stipulation of the parties the defendants based said payments upon an assumed 25 percent whole body impairment). Hence, a weekly shortfall of \$401.37 (\$542.00 owed to plaintiff less the \$140.63 actually paid to plaintiff).

Owing to the lack of a reasonable controversy regarding plaintiff's entitlement to ongoing TTD benefits, the applicable statutory penalty of 50 percent yields a sum of \$200.68 per week owed in penalties from and after February 7, 2004. Having found that a penalty is due and owing, the Court is also required pursuant to Section 48-125(1) to enter an award of attorney's fees. The award must be calculated on a case-by-case basis. Based upon the criteria established under *Harmon v. Irby Constr. Co.*, 258 Neb. 420, 604 N.W.2d 813 (1999) the Court believes that the plaintiff is entitled to an attorney's fee in the amount of \$1,500.00. Additionally, the Court observes that Neb. Rev. Stat. § 48-125 (2) specifically provides that "[w]hen an attorney's fee is allowed pursuant to this section, there shall further be assessed against the employer an amount of interest on the final award obtained, computed from the date compensation was payable. . . ." Thus, an award of interest is also due and payable.

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

1. The plaintiff have and recover of the defendants temporary total disability benefits in the amount of \$542.00 per week for the time period from April 17, 2003, to the date of trial and continuing thereafter for so long as plaintiff shall remain temporarily totally disabled.
2. The defendants 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 V above.
3. The defendants 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 injury as detailed in Paragraph VI above.
4. The defendants are entitled to a credit for the payments of indemnity and medical benefits previously made as referenced in Paragraph VII above.
5. The plaintiff is entitled to an award of attorney's fees, penalties, and interest as further detailed in Paragraph VIII above.

Dated at Lincoln, Lancaster County, Nebraska, on this 7th day of March, 2005.

NEBRASKA WORKERS' COMPENSATION COURT
/s/John R. Hoffert
JUDGE

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