

IN THE NEBRASKA WORKERS' COMPENSATION COURT

RON MARSHALL,

Plaintiff,

vs.

CRETE CARRIER AND
TRANSPORTATION CLAIMS, INC.,

Defendants.

DOC: 204

NO: 0656

AWARD

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AND FILED

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NEBRASKA WORKERS'
COMPENSATION COURT

APPEARANCES:

Plaintiff: Martin V. Linscott
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Defendants: Jack A. Dike
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This cause came on for hearing before the Nebraska Workers' Compensation Court at Lincoln, Lancaster County, Nebraska, on February 22, 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, and cause submitted with the receipt of briefs post-trial. The Court having listened to the testimony presented at trial; having reviewed the exhibits introduced 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 an employee of the defendant/employer, Crete Carrier Corporation, on the date of his accident of March 4, 2003; (2) that the plaintiff, indeed, suffered an accident arising out of and in the course and scope of his employment with the defendant/employer on

March 4, 2003; (3) that the plaintiff suffered injury to his low back in said accident; (4) that the plaintiff provided notice of the accident as soon as practicable to the defendants; (5) that at the time of the accident the plaintiff earned an average weekly wage of \$971.58 which amount thus entitled plaintiff to the maximum weekly temporary total disability rate then in effect of \$542.00 per week; (6) that defendants have paid \$56,230.72 in medical expenses to or on behalf of the plaintiff in accordance with the applicable medical fee schedules; (7) that defendants have paid temporary total disability benefits in the amount of \$28,184.00 to the plaintiff encompassing the time period from March 12, 2003, through March 9, 2004, or 52 weeks; (8) that both venue and jurisdiction were proper.

The plaintiff offered into evidence Exhibits 1 through 8 and 22. The defendants objected to Exhibit 4, a decision rendered by the Social Security Administration on plaintiff's application for federal disability benefits. The Court sustained the defendants' objection to Exhibit 4. The defendants next objected to Exhibits 6 through 8 arguing that the medical bills set forth in said exhibits were not related to the accident at issue. The Court overruled the objections indicating that it would, of course, only order those medical bills paid that were shown to be causally related to the subject accident. Consequently, the Court received into evidence plaintiff's Exhibits 1 through 3; Exhibits 5 through 8; and Exhibit 22.

The defendants, in turn, offered Exhibits 9 through 21 into evidence. The plaintiff objected to Exhibit 15 arguing that the reports of the medical case managers, Ms. Marcia Modica and Ms. Gayle Furrow, constituted hearsay and were irrelevant. The Court sustained the plaintiff's hearsay objection. Consequently, the Court received into evidence defendants' Exhibits 9 through 14 and Exhibits 16 through 21. [The parties agreed that the Court could rule post-trial on any objections set forth in the various medical depositions offered and received into evidence (Exhibits 9-11). Having had the opportunity to review the transcripts, the Court overrules all objections set forth therein.]

II.

Owing to the various stipulations entered into by the parties to include employment, average weekly wage, occurrence of accident with resultant injury to the low back, the issues for resolution are few in number. Indeed, the parties agree, as referenced in their post-trial briefs, that the two primary issues remaining for resolution involve the extent of the plaintiff's entitlement to temporary total disability benefits and the payment of several medical bills submitted by plaintiff.

The Court first turns its attention to the issue of temporary total disability benefits and plaintiff's entitlement to same. It is the plaintiff's position that he is owed ongoing temporary total disability benefits and that the defendants' termination of TTD payments was improper.

The basis for the plaintiff's assertion in this regard stems from his belief that he has not reached maximum medical improvement (MMI). The plaintiff points to the opinions of plaintiff's treating or examining physicians and their alleged universal belief the plaintiff is in need of further treatment. Specifically, these medical experts according to the plaintiff indicate that plaintiff needs

further treatment for his physical injuries but the psychological aspects of his overall make up must be addressed first. Absent treatment directed toward his psychological issues or depression, plaintiff argues that he remains temporarily totally disabled.

The Court does note that there exists a medical opinion causally linking the plaintiff's psychological state to the accident and injury at issue. For instance, Dr. Nunzio P. Pagano indicated that not only was the plaintiff's back injury causally related to the accident of March 4, 2003, but his resulting depression as well (E9, p. 40, lines 2-19). The Court observes that no other medical expert has challenged this causal nexus. Hence, the Court finds that the plaintiff's psychological state to include his depression is related to the accident and low back injury sustained in the stipulated accident.

Hence, the question becomes not one of segregating the issue of MMI as to either the physical or psychological injury (separately considered in a vacuum) but one of deciding whether the plaintiff has reached MMI from his injuries in total. Each of the experts who have addressed the issue of additional treatment share a common belief that the plaintiff ought to be evaluated and, if appropriate, treated for his psychological problems (the Court noting that no physician has opined that the plaintiff is malingering or otherwise manipulating the presentation of his psychological symptoms). Dr. Pagano indicated in his deposition that behavioral counseling or pain coping skills would be appropriate for the plaintiff (E9, p. 31, lines 10-16).

The testimony of Dr. William C. Welch proved particularly persuasive to the Court as it wrestled with the issue of whether or not the plaintiff had reached maximum medical improvement. Dr. Welch testified that before considering additional treatment measures for the plaintiff's physical condition such as a morphine pump or spinal cord stimulator it would be beneficial for the plaintiff to undergo evaluation for and, if appropriate, participation in some behavioral or coping mechanism program (E10, p. 28, lines 5-20). Additionally, Dr. Welch stated his belief that the plaintiff would benefit from an aggressive physical therapy program but that his current psychological state served to militate against any enrollment in such an endeavor-at this time (E10, p. 29, line 17-p. 30, line 25). Finally, Dr. Welch advised that he did not believe the plaintiff to be at maximum medical improvement and that plaintiff would not reach that state until after he was evaluated for an aggressive impatient pain management program (E10, p. 37, line 4-9).

Dr. J.K. Lilly, III, also testified that because of the plaintiff's psychological state further intervention for his physical injuries would not be appropriate. Specifically, Dr. Lilly indicated that surgical approaches to plaintiff's pain (implantation of an intrathecal opioid device or spinal cord stimulator) should be deferred until his psychological overlay is addressed (E11, p. 49, line 5-p. 51, line 11). Dr. Lilly then advised that the plaintiff ought to undergo evaluation for some type of behavioral modification program, cognitive and behavioral therapy (E11, p. 51, line 16-p. 52, line 1). Other passages from Dr. Lilly's deposition are also worthy of note:

My recommendations at that time were that in my opinion interventional care would be inappropriate until--interventional meaning the physiologic approach to pain-- would be inappropriate or less beneficial. The outcome is in question until the psychologic issues have been addressed. (E11, p. 63, lines 8-13). (Emphasis added)

I think that based on my evaluations of him that for him to proceed with a meaningful, productive life, in other words, perhaps to rejoin the work force or to have a fully functional life, as a medically retired person, his behavior and the consequences of it should be addressed. (E11, p. 65, lines 2-6).

The Court concludes from the opinions referenced above that the plaintiff is in need of at least an evaluation to determine his candidacy for the psychological treatment programs discussed by the various medical experts. Indeed, the Court understands that the defendants concede via a stipulation in open court that the plaintiff ought to be evaluated as to his suitability for a pain management program (the defendants reserving the right, of course, to contest any such recommendation if, indeed, such an opinion is forthcoming).

The issue, as noted previously, is whether or not the plaintiff remains temporarily totally disabled while he awaits this evaluation. The common thread or theme which evidences itself in the deposition testimony recounted above appears to be that further interventional measures (whether it be aggressive physical therapy, spinal cord stimulator, morphine pump, or injections) for plaintiff's physical condition should be deferred until plaintiff's psychological condition is addressed.

While it may well be legitimately argued that absent such an evaluation the plaintiff is at maximum medical improvement for his "physical" injury, such a position is too myopic. In other words, the Court is of the belief that the medical evidence suggests that plaintiff's underlying physical condition requires additional medical intervention but his psychological status has proven to be a barrier to any such further treatment. Additionally, the claim that the plaintiff is at MMI must be tempered by the fact that at least one medical expert has expressly indicated that the plaintiff would have serious difficulties in rejoining the work force without some form of behavioral support (report of Dr. Lilly as found at Exhibit 11, p. 107).

Hence, the Court concludes that the plaintiff has remained temporarily totally disabled from and after his last day of work on March 12, 2003, through the date of trial and continuing thereafter in the foreseeable future. The Court certainly appreciates and understands the defendants' concern that the plaintiff's psychological presentation ought to be regarded with some degree of suspicion. The medical experts certainly have observed that the plaintiff's behavior and response to physical examination and/or injections was dramatic and at times inconsistent. However, as noted previously, no expert has opined that the plaintiff's psychological presentation was the result of a conscious effort to manipulate or skew the outcome. If defendants meant to suggest that the plaintiff was consciously malingering or otherwise feigning results to enhance his position for pecuniary gain in this litigation, no persuasive evidence was offered. The Court, to be sure, noted the inconsistencies with concern but simply cannot (based on the evidence before it) ascribe any negative connotation so as to negate or otherwise find that the plaintiff is entitled to less than the evidence has shown him to be.

Given the stipulation of the parties as to the plaintiff's average weekly wage of \$971.58, the plaintiff is entitled to the statutory maximum in effect on the date of his accident of \$542.00 per week from and after March 12, 2003, through the date of trial and continuing thereafter into the foreseeable future so long as he shall remain temporarily and totally disabled.

III.

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 at this time. The obvious lack of evidence with regard to MMI; 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.

IV.

Given the stipulations of the parties relative to the compensability of plaintiff's accident and injury as well as the Court's findings detailed above, it necessarily follows that all medical bills reasonably incurred in the treatment of said injury should be ordered paid by the defendants. It is the Courts understanding that only three bills are alleged to be outstanding at this time (see generally, Exhibits 5-8).

The Court has carefully reviewed the charges detailed in said exhibits and finds that it is not persuaded that said charges were necessitated or otherwise causally related to the low back injury suffered in the stipulated accident. A review of the emergency department nursing records from Summersville Memorial Hospital indicates that the plaintiff sought treatment for abdominal pain which started after lifting items from behind the seat of his pickup truck (E3, p. 2). The Court finds no satisfactory expert opinion linking plaintiff's complaints or the medical test incurred in the analysis and treatment of same to be related to the low back injury found to be compensable herein. Consequently, the Court respectfully declines to order that the defendants pay the medical bills submitted by plaintiff as outstanding.

V.

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. 457, 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 refers the reader to its discussion above regarding the prevailing view among the medical experts that the plaintiff ought to be evaluated for his candidacy for treatment at an inpatient pain management clinic. Indeed, the defendants concede that the plaintiff ought to be evaluated but reserve the right to contest any recommendation of actual enrollment in such program pending the opportunity to have the plaintiff evaluated by an expert of its choosing on the same issue.

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, in which otherwise satisfies all necessary foundational elements thereto, should be provided at the expense of the defendants.

VI.

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 in the stipulation of the parties entered into at the commencement of trial and as detailed in Exhibit 14 and 17.

VII.

Finally, the Court is called upon to resolve the issue of whether or not the plaintiff is entitled to an award of attorney's fees, 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.

The Court has carefully reviewed the evidence submitted and finds that the defendants did have a reasonable basis upon which to deny plaintiff's request for ongoing temporary total disability benefits from and after February 25, 2004. It was on that date that Dr. Lilly proclaimed that the plaintiff was at MMI and could return to work (E11, p. 40, line 1-p. 40, line 19). While the Court later determined that MMI was not, in fact, reached, this is not to suggest that the defendants were bereft of any basis to argue that the plaintiff, nonetheless, could return to work.

In sum, the Court rejects the plaintiff's request for an award of attorney's fees, penalties, and interest. Though not adopted by the Court, a basis did exist for the plaintiff to reasonably argue that the plaintiff was not entitled to the ongoing TTD benefits ultimately awarded to him by the Court.

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 March 12, 2003, to the date of trial and continuing thereafter for so long as plaintiff shall remain temporarily totally disabled.
2. The defendants are 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 further detailed in Paragraph V above.
3. The defendants are entitled to a credit for the payment of indemnity and medical benefits previously made as further detailed in Paragraph VI above.

Dated at Lincoln, Lancaster County, Nebraska, on this 14th day of March, 2005.

NEBRASKA WORKERS' COMPENSATION COURT



John R. Hoffert
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JUDGE

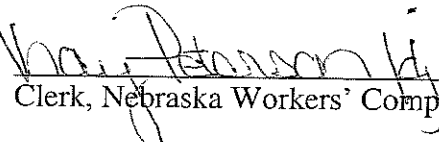
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CERTIFICATE OF SERVICE

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 14th day of March, 2005, addressed as shown below, to the following:

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