

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER E909069

EDWIN L. CARLISLE, EMPLOYEE

CLAIMANT

KING TRUCKING, EMPLOYER

RESPONDENT

**BITUMINOUS CASUALTY INSURANCE
COMPANY, CARRIER**

RESPONDENT

OPINION FILED MARCH 2, 2004

A hearing was conducted on January 21, 2004, before ADMINISTRATIVE LAW JUDGE DON N. CURDIE, in Mountain Home, Baxter County, Arkansas.

The claimant was represented by the Honorable Frederick S. Spencer, Attorney at Law, Mountain Home, Arkansas.

The respondent was represented by the Honorable Randy P. Murphy, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The hearing was held in Mountain Home, Arkansas, on January 21, 2004.

It was stipulated as follows:

1. The employee-employer-carrier relationship existed at all relevant times.
2. The claimant sustained a compensable low back and left leg injury on July 26, 1999.
3. The respondent paid temporary total disability from July 26, 1999, to August 21, 2000, at the rate of \$285.00. (T-57)

The issues to be litigated at the hearing were as follows:

1. What was claimant's average weekly wage?

2. Is claimant entitled to temporary total disability from February 2, 2000, (the date he received maximum medical improvement according to Dr. Cathey and Dr. Burnett), through March 8, 2000, the date of claimant's return to work?

3. Is claimant entitled to reimbursement of medical payments or unpaid medical bills as reasonable and necessary medical treatment?

4. Is claimant entitled to future medical and psychiatric treatment as reasonable and necessary medical treatment?

5. Is claimant entitled to a 10% permanent impairment rating given by Dr. Burnett, a 6% impairment rating from Dr. Cathey, or a 7% impairment rating from Dr. Schlesinger? (Respondent controverts all three permanent impairment ratings since respondent alleges that the claimant suffers from degenerative disc disease, and the claimant cannot show major cause).

6. Wage-loss disability was reserved.

The claimant testified that he was working for respondent/employer as a truck driver, and specifically testified regarding his injury:

"A. I had stopped at Jonesboro to get my truck worked on and they wanted me to disconnect the trailer so I could take the tractor into the shop. They have a drop yard out there where you drip the trailer, so when I went to un-connect the trailer and everything, when I went to pull the king pin, my leg slipped cause they had a gravel parking lot and next thing I knew, I was down on the ground with my back."

(T-14, 15)

The claimant testified extensively regarding his average weekly wage.

The claimant testified that he worked for King Trucking on separate occasions. He drove a truck to Memphis, Tennessee and back, but testified that he had other duties

with respondent, and his rate of pay and number of hours depended on the work that needed to be done and his availability. He stated:

“Some of us, it depends on how able we are about being versatile, they will move us around to where they need us, like if somebody don’t show up for hauling concrete that morning, they make you go down there and do that, or you know in my case, they wanted me to run over the road and haul oil, because I had experience doing it and when it got slow I would drive a dump truck for them and I would move equipment for them, you know, it just depended on what we needed done that day.”

_____(T-12)

Then, claimant testified as follows:

“JUDGE CURDIE: Well, let me say this while Mr. Murphy is mentioning it, that indication there November of ‘98, you made two hundred and forty-six dollars, let me just ask you why didn’t you make five fifteen?”

A. Well, because instead of pulling oil that week or whatever, that month probably they were done with their road work and they didn’t need the oil pulled so they put me back in another truck in King Trucking or King Ready Mix and they pay an hourly wage there instead of paying you by the trip.”

(T-21)

In summary, the claimant’s testimony reflected that he drove to Memphis, Tennessee and was paid \$103.00, or if he was not needed for that over-the-road trip he would work around the cement plant or do local driving. He was paid by the hour and the hourly rate varied. The claimant testified as follows:

“A. I would pull oil probably five to six, seven months, depending on the weather, then when it slowed down, I would be in a dump truck or I would haul concrete for them.

Q. So your understanding as to how you were to be paid, when you started driving over the road, when you were hired to do that, was that you were to be paid per load on these trips hauling oil to Memphis, is that right?

A. Yes.

Q. And when that work wasn't available, you were paid by the hour for the local work, whether it was around the cement plant or driving locally, is that correct?

A. That's correct.

Q. **So naturally, your pay varied, that's the reason we see different amounts on your pay history?**

A. **Correct.**

Q. **And that's the way you understood how you were to be paid when you were hired to do this?**

A. **Yes, when they put me on the road, they said I'd pull oil until it slowed down or it got slow, like if it rained one day and they had plenty of oil, even if it was in the summertime and they couldn't do any of the work, I would just be put in the dump truck or something.**

Q. **So essentially you were told you might be making more money one week as opposed to the next week, and you understood that?**

A. **Well, they didn't come right out and say that, but that's, I knew that's how it worked.**

Q. You understood that?

A. Yes."
(T-22, 23)(Emphasis added)

The claimant testified that when he returned to work after his accident, he did not drive to Memphis anymore. The claimant testified that he drove the long hauls only five to seven months during the year.

The claimant testified that prior to July 26, 1999, he experienced no significant low back problems. Certainly, he testified, they were not serious enough to require medical treatment. The claimant saw Dr. Richard Burnett after his accident. An MRI showed herniated and protruding discs. On or about August 19, 1999, the

claimant was referred to Dr. Steven Cathey. A subsequent MRI showed a disc herniation, but a nerve conduction test showed no nerve root impingement. The claimant was taken off work for a period of time. He was returned to work by Dr. Cathey on or about October 18, 1999. The claimant returned to see Dr. Burnett, who ordered an epidural injection.

The claimant testified that he was depressed and returned to see Dr. Cathey. The claimant was ultimately referred for treatment to a psychiatrist, Dr. Steven Austin.

In April, 2003, the claimant returned to work as a truck driver making local runs with respondent/employer. The claimant suffered a heart attack, which required the placement of a stint. The claimant worked as a truck driver for a company in Springfield, Missouri, and then in April, 2003, began his job with his current employer.

The claimant testified that his back continues to bother him.

“A. Well, my left leg goes numb quite a bit, quite often, I can’t lift anything, I don’t, I don’t dare bend over to pick up anything over twenty pounds because I’m afraid I’ll throw my back out or something and it’s just an everyday pain. I wake up in bed the morning and chances are, there’s a good chance I’m not going to, I can’t get out of bed, my wife has to help me roll out of bed some mornings.”
(T-67)

The claimant testified that he does not sleep well and believes his condition is worse. However, the claimant drives approximately seven to eight hours a day on a five to seven day a week schedule.

The claimant testified that he is being treated by the psychiatrist, Dr. Austin, who treats the claimant for depression. He takes medication for depression. The claimant has a somewhat extensive history of personal problems that have led him

to seek medical treatment. Because of previous personal and criminal problems, the claimant, at different periods of time, took anti-depressants and sought hospitalization throughout the last 15 years. These problems extended, according to the medical records and claimant's own statements, all the way back to 1984. Because of considerations of suicide, the claimant took a number of anti-anxiety and anti-depression medications throughout the '80s and '90s. He has experienced some incarcerations and prior arrests for criminal and relationship problems.

Mr. Tony Belk, an accountant with respondent/employer, testified at the hearing that he has been employed by respondent/employer for five or six years. He testified regarding the claimant's average weekly wage:

“Q. And he indicated that at the time of the accident he was being paid five-fifteen a week, is that correct by King Trucking?”

A. It would not be per week, the rates would vary, depending on the number of loads he hauled per week.

Q. Would you look at the three weeks before this accident sir, and tell me what was his average weekly wage?

A. What was the date of his accident?

Q. The date of his accident I believe was July the 20th.

A. July the 26th, excuse me, of '99?

A. The last three weeks that he was paid?

Q. Yes sir.

____A. He would not have averaged five-fifteen.

Q. Let me look at the document, apparently Mr. Murphy handed you the, what has been marked as respondents exhibit one.

A. The last three weeks would have been the four twelve, the four eight-

two and five-fifteen. This here is a this is your check date, this is your week ending date, your check date would have been 7/23 of '99, his pay would have been four twelve on 7/16 of '95 or '99 I'm sorry, his pay would have been four eighty-two forty then on 7/9 of '99 his pay would have been five-fifteen depending on the number of loads that he makes, now I'm strictly - - - go ahead.

Q. I'm sorry, I didn't mean to interrupt.

A. If he would have run just like strictly to Memphis, you know, and made five trips like he said earlier then yes, he would have averaged five-fifteen, but each week is different depending on what supply meets demand, basically.

Q. July 2nd, it's five-fifteen for that week, is that right?

A. Yes.

Q. June 15th, five-fifteen?

A. Yes, that is correct.

Q. June 18th, five fifteen?

A. Um hm.

Q. Okay now - - -

.....

A. When he was working, I mean, basically if you're working for King Trucking you get paid by the load it does not matter the number of work hours you work, if you know, the more loads you run, whether he runs to Memphis or he runs to Springfield you know, it just depends on how busy we are as to depending on how much he's going to make.

(T-81, 82)

.....

"Q. The pay of that Mr. Carlisle working for King Tucking was by the load is that right?

A. That is correct.

Q. And it varied, based on the number of loads that were available, is that right?

A. Yes.

Q. And this depended on weather and whether or not King Tucking had the loads to haul is that correct?

A. That is correct.”
(T-86)(Emphasis added.)

The claimant’s wife appeared to testify and it was stipulated that if called as a witness she would duplicate and corroborate claimant’s testimony.

The medical records in this case reflect that after the claimant’s injury in July, 1999, he was removed from work until August 2nd. An MRI in August showed a herniated nucleus pulposus at L4-L5 compressing the thecal sac. There was no nerve root impingement. The MRI also detected a protruding disc at L5-S1.

Dr. Steven Cathey stated that tests showed mild degenerative disc disease at L4-L5 and L5-S1. There was no spasm noted and no stenosis. Dr. Cathey stated in an August 19, 1999, letter to claimant’s primary care physician:

“Dr. Burnett, I believe Mr. Carlisle is the victim of a musculoskeletal injury superimposed on pre-existing degenerative lumbar disc disease. Unfortunately, this is not something that is likely to benefit from lumbar disc surgery or other neurosurgical intervention. We are therefore left with conservative treatment, although we both recognize that the results are oftentimes less than gratifying.”
(Cx-1, p. 10)

Dr. Cathey returned the claimant to work as of October 18, 1999. A nerve conduction in October, 1999, reflected the following: “The findings are consistent with nerve root compression in the lower back, especially L4, 5, and S1 levels.” (Cx-1, p. 13)

Epidural steroid injections did not help the claimant and reflected pain in his left leg. Medical records reflect that the claimant exhibited depression during this

period of time. In January, 2000, Dr. Steven Cathey repeated an MRI on the claimant.

He stated:

“Dr. Burnett, since the patient has a normal neurological examination, **there is no clinical correlation with the abnormal electrodiagnostic testing.** I therefore believe these findings are spurious and not clinically significant. It remains my opinion that Mr. Carlisle is the victim of a musculoskeletal injury superimposed on preexisting degenerative lumbar disc disease. Again, I do not believe he is going to benefit from lumbar disc surgery, spinal fusion, or other neurosurgical intervention. As far as his job is concerned, I still believe he may return to work without restrictions whenever he feels he can handle himself there.” (Cx-1, p. 19)(Emphasis added.)

A functional capacity evaluation of February 15, 2000, showed the claimant could perform “modified medium work on a full time setting.”

In February, 2000, the claimant’s treating primary care physician, Dr. Richard Burnett, stated that the claimant has a 10% permanent impairment. A question was asked Dr. Burnett: “Isn’t this 10% impairment a result of the degenerative disease since he only suffered from aggravation of his pre-existing condition and no surgery was performed?” The doctor’s answer was “Yes.” (Cx-1, p. 31)

In a letter dated February 17, 2000, Dr. Cathey stated that none of claimant’s degenerative disc disease was attributable to his work related injury. He was assessed a 6% permanent impairment rating for his degenerative disc disease and Dr. Cathey stated the rating was not related to his on-the-job injury. Dr. Cathey stated that he agreed with Dr. Burnett that the claimant had reached maximum medical improvement.

Claimant, during this time, was seeing Dr. Steven Austin, a psychiatrist. He was diagnosed as having “dysthymic disorder.” (Cx-1, p. 43) In a letter dated

January 9, 2001, Dr. Austin stated that the claimant's psychological problems "Are causally connected to the physical injuries sustained on July 26, 1999, when he hurt his back pulling a king pin to undo a trailer." (Cx-1, p. 45) The claimant saw Dr. Scott Schlesinger, a neurosurgeon, in May, 2002. Dr. Schlesinger examined the claimant's MRI and stated:

"He has degenerative changes in L4-5 and L5-S1 level with slight central protrusion. There is certainly nothing of surgical significance. He does not need any operation. I think he has reached maximum medical improvement as well and do not feel that any further treatment of any kind is justified. I would give him a permanent partial disability rating for the degenerative changes and small midline disc bulges in accordance with The American Medical Association publication Guides to the Evaluation of Permanent Impairment of 7% for the lumbar spine. I believe if the patient's history is accurate that all of his pain, problems and disability rating **is all related** to the injury in July 1999." (Cx-1, p. 47)(Emphasis added.)

In a letter dated June 14, 2002, Dr. Schlesinger clarified his opinion:

"I cannot objectively relate the degenerative changes and disc bulges to his accident. The degenerative changes probably did exist radiologically before the accident in July 1999, but I do not have any objective proof of this as I do not have any MRI's from before this date. I can only state that based on the history given to me that his pain began on this date of the accident and he did not have back pain prior to this. If this is accurate information, then I can state with a reasonable degree of medical certainty that the 7% rating is based on the accident on July 26, 1999. There is no way I can be objective on this other than the radiologic findings. I have no objective proof of his historical information. As regards to your final question, there is no objective basis to relate the findings on his MRI to a specific accident. Once again, my opinion of his disability rating was solely based on his history. If this proves to be inaccurate and he was indeed suffering from pain in his back prior to the injury, then I could not state with a reasonable degree of medical certainty that the injury was the cause of his problems." (Cx-1, p. 49)(Emphasis added.)

On November 14, 2003, Dr. Schlesinger stated as follows:

“The above-mentioned man is a patient of mine. It is my opinion, within a reasonable degree of medical certainty, that assuming that Mr. Carlisle did not have any significant back problems before his accident on July 26, 1999, the major reason for the 7% impairment rating given is his work related injury when he injured his back and left leg while pulling a kingpin out of the trailer.”
(Cx-1, p. 50)

Dr. Stephen Austin, claimant’s psychiatrist, testified by way of deposition, (Respondent’s Exhibit #2) that he is a psychiatrist and saw the claimant for psychiatric treatment. He stated that the claimant’s treatment is related to the physical injury sustained by the claimant on July 26, 1999. He stated that the claimant was taking many psychiatric drugs for depression. He stated the claimant has a “dysthymic disorder.” Dr. Austin clarified his findings, stating that the claimant suffered from dysthymic disorder **at least two years before February, 2000.** (The injury was in 1999) He testified as follows:

“Q. (Continuing) Doctor, I’ll refer you to February 8, 2000. And let me just show it to you, unless you can find it pretty handily.

(Whereupon, a document is examined by the witness.)

A. February 8, 2000.

Q. And do you see where she (meaning claimant’s wife) reports he (claimant) has been paranoid, verbally abusive, threatens to kill animals in her kennel- - -

A. And/or let them loose.

Q. “His behavior is worse in the past four to five months. He disconnected phone from pole last night. She is suspicious he is using drugs. She wants him to get help, but he refuses to take medication or be hospitalized.”

A. I see that.

Q. And who is this person that’s- - -

A. Jeannie Dunn.

Q. And who is that?

A. She was licensed psychological examiner that was working here up until September.

Q. All right. And apparently there's some discussions regarding commitment proceedings with Ms. Carlisle.

A. Yes.

Q. Did you review in detail the documentation concerning Mr. Carlisle's activities and his wife's description of those activities predating your contact with Mr. Carlisle? And I'm referring to the records before you saw him. Did you go back and review those records such as the entry I just read to you?

A. I didn't review that entry, no.

Q. Were you aware that Mr. Carlisle had filed for divorce in February of 2000?

A. No.

Q. Were you aware that in February of 2000 Ms. Carlisle had called the sheriff's department because Mr. Carlisle had locked her employee out who came to feed the animals?

A. No.

Q. Okay. It's fair to say you weren't aware of the extent of any marital problems that Mr. Carlisle was suffering?

A. That's fair."
(Rx-2, p. 25, 26, 27)

Dr. Austin stated specifically, within a reasonable degree of medical certainty, that the psychological problems that claimant was experiencing are causally related to the physical injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employee-employer-carrier relationship existed at all relevant times.
2. The claimant sustained a compensable low back and left leg injury on July 26, 1999.
3. The respondent paid temporary total disability from July 26, 1999, to August 21, 2000, at the rate of \$285.00. (T-57)
4. The preponderance of the evidence reflects that the claimant's average weekly wage was \$285.00
5. The preponderance of the evidence reflects that the claimant is not entitled to temporary total disability benefits since during the period requested, he was not in a healing period and totally incapacitated from earning wages.
6. The preponderance of the evidence reflects that the claimant is entitled to reasonable and necessary medical treatment (not related to the psychiatric treatment) prior to February 2, 2000, but not subsequent thereto. The claimant's attorney is awarded an attorney's fee on the unpaid medical.
7. The preponderance of the evidence reflects that the claimant is not entitled to permanent partial disability. The preponderance of the evidence reflects that the claimant's work-related injury was not the major cause of his disability or need for treatment.
8. The preponderance of the evidence reflects that the claimant is not entitled to treatment pursuant to A.C.A. 11-9-113 (psychiatric treatment.)

DISCUSSION

1. AVERAGE WEEKLY WAGE.

Respondent's Exhibit #1 contains an employee pay-out history for claimant for a one year prior to the accident. The claimant's average weekly wage during that period was \$428.00. (T-156 to 163). The preponderance of the evidence reflects that the claimant did not have a contract of hire wherein he was to be paid the amount of money that he was making on the date that he was injured. The claimant was driving to and from Memphis, Tennessee, and was making \$103.00 per load for five days a week. However, the preponderance of the evidence reflects that there were other periods of time when claimant made different amounts of money for different jobs he performed. A.C.A. § 11-9-518 (Supp. 2003) states:

“Where the injured employee was working on a piece basis the average weekly wage shall be determined by dividing the earnings of the employee by the number of hours required to earn wages during the period not to exceed 52 weeks preceding the week in which the accident occurred, and by multiplying this hourly wage by the number of hours in a full time work week in the employment.

If because of exceptional circumstances, the average weekly wage cannot be fairly and justly determined by the above formulas, the Commission may determine the average weekly wage by a method that is just and fair to all parties concerned.”

The most reflective of claimant's average weekly wage is the average of what he earned the 52 weeks prior to his accident. The preponderance of the evidence reflects that the claimant's average weekly wage at the time of his injury was \$428.00, which entitled him to a weekly temporary total disability rate of \$285.00.

2. TEMPORARY TOTAL DISABILITY FROM FEBRUARY 2, 2000, TO MARCH 8, 2000.

On January 6, 2000, Dr. Cathey stated that the claimant complained of chronic low back pain that claimant was relating to his 1999 injury. Dr. Cathey stated

that the claimant's neurological exam was negative. There was no sign of lumbar radiculopathy, nerve root impingement, and straight leg raising produced no low back pain. There were no muscle spasms. Dr. Cathey noted degenerative disc disease on the MRI that he performed on January 1st. He returned the claimant to work without restrictions.

Dr. Richard Burnett, the claimant's primary care physician, wrote a report dated January 14, stating that the claimant had reached maximum medical improvement. (Cx-1, p. 31). The claimant is entitled to temporary total disability during the time when he was within a healing period and totally incapacitated from earning wages. Dr. Burnett stated that his 10% permanent impairment rating was a result of the degenerative disc disease, and the claimant had only suffered a temporary aggravation. The preponderance of the evidence reflects that the claimant was not in a healing period and totally incapacitated from earning wages subsequent to February 1, 2000. Therefore, claimant is not entitled to temporary total disability from February 2, 2000 through March 8, 2000, the date he actually returned to work.

3. MEDICAL TREATMENT/PSYCHIATRIC TREATMENT

As stated earlier, the claimant reached maximum medical improvement prior to February 2, 2000. The claimant is entitled to have respondent pay for medical treatment which is reasonably necessary and related to his compensable injury. The preponderance of the evidence reflects that the claimant is not entitled to medical treatment subsequent to the date he reached maximum medical improvement, as set according to Dr. Cathey and Dr. Burnett as February 2, 2000. His non-psychiatric medical treatment prior to that date was reasonably necessary and related to the

compensable injury.

The claimant alleges that he is entitled to benefits pursuant to A.C.A. § 11-9-113 (Supp. 2003). Section 113 states that a mental illness is not a compensable injury unless it is caused by a physical injury to the employee's body. This section also reflects that no mental injury or illness shall be compensable unless it is also diagnosed by a licensed psychiatrist or a psychologist, and unless the diagnosis of the condition meets the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders, (DSM) Volume IV. The preponderance of the evidence reflects that the claimant has not demonstrated that any diagnosis pursuant to DSM IV was caused by his physical injury. The psychiatrist stated that the claimant had "dysthymic disorder," and that the claimant had this disorder **at least two years prior to February, 2000. It was his opinion that the claimant suffered from depression from at least February, 1998.** (Rx-2, p. 19). Additionally, the preponderance of the evidence reflects that the claimant was suffering from depression for many years prior to 1999. It is the claimant's burden to prove by preponderance of the evidence each and every element involving a psychological injury. The preponderance of the evidence reflects that the claimant's compensable injury was not the cause of his mental injury or illness.

4. PERMANENT IMPAIRMENT RATING.

The claimant alleges that he is entitled to a 10% permanent impairment rating to his whole body and not the 6% permanent impairment rating given by Dr. Cathey or the 7% permanent impairment rating given by Dr. Schlesinger. The

respondent controverts all three permanent impairment ratings. A.C.A. § 11-9-102(4)(F)(ii)(a) states:

“Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. (b) If any compensable injury combines with a pre-existing disease or condition or the natural process of aging to cause or prolong disability or a need for treatment permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

The claimant had a degenerative disc condition which pre-existed his injury at work on July 26, 1999. The work injury, the preponderance of the evidence reflects, caused the degenerative disc disease to become symptomatic. No surgery was performed on the claimant’s back. Dr. Schlesinger stated that there was no objective basis to relate the findings on his MRI to a specific accident. His opinion of disability was based solely on the claimant’s history. Dr. Cathey stated that his 6% permanent impairment rating had no relationship to his on-the-job injury. Dr. Burnett stated that the claimant suffered an aggravation of his pre-existing degenerative lumbar disc disease. He stated that the 10% was a result of the degenerative disease, since he only suffered from an aggravation of his pre-existing condition. Pollard v. Meridian Aggregates, 2003 AWCC 198, Claim Number F004974, Full Commission Opinion filed November 10, 2003, stated:

“We understand Section 102(4)(F)(ii)(a) to require the claimant to establish that a work injury in fact caused some degree of identifiable abnormality at issue, and that the claimant has not established his burden of proof where the preponderance of the evidence instead establishes that the work injury only aggravated a preexisting stenosis condition. Accord Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 141 (1998). Since the claimant has failed to establish by a

preponderance of the evidence that his work-related injury caused the stenosis which required surgery, we find that the claimant has failed to establish that his compensable injury was the major cause of the 11% impairment assigned by the Administrative Law Judge for surgical treatment to the spinal stenosis.”(Emphasis added.)

The preponderance of the evidence reflects that the claimant has not established that the injury was the major cause of the claimant’s disability or impairment.

AWARD

It is hereby Ordered that the claimant’s non-psychiatric medical treatment prior to February 2, 2000 is reasonably necessary and related to the work-related injury. The respondent shall be responsible for that treatment. Claimant’s attorney is entitled to the maximum attorney’s fee on the unpaid medical with interest.

IT IS SO ORDERED.

DON N. CURDIE,
Administrative Law Judge

DC