

FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 02-030133

Employee: Emmanuel Caldwell

Employer: Hussmann Corp.

Insurer: ACE USA, Inc.

Date of Accident: Alleged March 13, 2002

Place and County of Accident: Alleged St. Louis, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Employer/insurer filed a Motion to Dismiss the employee's Application for Review. The Motion is denied.

Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 13, 2005, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued December 13, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this _____12th____ day of April 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

CONCURRING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

CONCURRING OPINION

I concur with the decision of the majority of the Commission to affirm the award of the administrative law judge in this matter.

I write by separate opinion to express my concern about the state of the record presented to the Commission on review. The exhibits came to the Commission with permanent highlighting marks throughout. I reiterate my previously expressed opinion that the addition of any permanent markings or annotations to documents, records, or depositions after their entry in the official record is inappropriate. If this case is appealed to the Missouri Court of Appeals or the Missouri Supreme Court, I want the appellate judges to know that the markings were not made by any member of this Commission.

John J. Hickey, Member

AWARD

Employee:	Emmanuel Caldwell	Injury No.: 02-030133
Dependents:	N/A	Before the
Employer:	Hussmann Corp.	Division of Workers'
Additional Party:	N/A	Compensation
Insurer:	Self-Insured c/o ESIS	Department of Labor and Industrial
Hearing Date:	July 12, 2005	Relations of Missouri
		Jefferson City, Missouri
		Checked by: JED:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: March 13, 2002
5. State location where accident occurred or occupational disease was contracted: St. Louis, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee was lifting while assembling refrigerator fronts.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Allegedly low back
14. Nature and extent of any permanent disability: -0-
15. Compensation paid to-date for temporary disability: \$1,090.28
16. Value necessary medical aid paid to date by employer/insurer? \$4,186.39

Employee: Emmanuel Caldwell

Injury No.:

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17. Value necessary medical aid not furnished by employer/insurer? None

18. Employee's average weekly wages: \$640.00

19. Weekly compensation rate: \$329.42/\$424.00

20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: None

22. Second Injury Fund liability: No

TOTAL: -0-

23. Future requirements awarded: N/A

Said payments to begin N/A and to be payable and be subject to modification and review as provided by law.

The compensation awarded to Claimant shall be subject to a lien in the amount of N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to Claimant:

N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Emmanuel Caldwell

Injury No.: 02-030133

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Hussmann Corp.

Department of Labor and Industrial
Relations of Missouri

Additional Party:

Insurer: Self-Insured c/o ESIS

Checked by: JED

This case involves a lifting incident and reported low back injury to Claimant with the reported accident date of March 13, 2002. Employer admits claimant was employed on said date and that any liability was fully insured. The Second Injury Fund is also a party to this claim but is not represented today. Both parties are represented by counsel.

A complete denial of benefits is always a serious matter and here the decision turned on numerous trial statements and records from a number of treatment providers over a period of years. Unavailability of the trial transcript, after the court reporter's unexpected re-employment elsewhere, ultimately required a review of audiotapes in lieu of a conventional transcript. The delay is inconvenient but thorough analysis is paramount. Section 287.460.1 RSMo (2000).

Issues for Trial

1. Unpaid medical treatment (authorized, necessary and reasonable);
2. nature and extent of TTD;
3. nature and extent of PPD.

FINDINGS OF FACT

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Chronology of Symptoms and Treatment

1. Claimant was building refrigerator fronts and felt pain in his right lower back on March 13, 2002.
2. Claimant first treated on March 18, 2002 at SSM where he denied a prior history of back injuries.
3. Claimant was diagnosed with thoracic and lumbar strain, and right SI joint pain. Physical therapy was recommended, and Claimant was put on restricted duty. Employer began temporary total disability ("TTD") payments on this date. He commenced physical therapy the next day.
4. He is seen for a recheck at SSM by Dr. Covert, who notes Claimant has no symptoms in lower extremities. He also notes Claimant "demonstrates bizarre affect when bending over" and makes mention of relation to the basketball season. Again, he is diagnosed with a back strain and continues physical therapy. He then follows up with SSM on March 28, 2002, and it is noted that he rarely takes Tylenol and has no lower extremity symptoms. He returns to SSM on April 4, 2002 and now complains of left sided low back pain. X-rays are negative.
5. Dr. Tate sees Claimant on April 8, 2002 and notes positive Waddell's signs, symptom magnification, myofascial pain, and that the pain is out of proportion with the objective findings. She administers a trigger point injection. He follows up with Dr. Tate on April 15, 2002, and she notes that the trigger point injection did not help, and that Claimant was no longer complaining of pain in the right low back, but was now complaining of *left sided* low back pain. She again notes subjective complaints without objective findings. She places him at MMI and returns him to work without restrictions.
6. On May 17, 2002, Claimant sees Dr. Rice on his own, who diagnoses him with muscular back pain and recommends more therapy. Two months later, on July 8, 2002, he complains to Dr. Rice of only of left knee pain after a basketball game. Claimant testified he recalled seeing Dr. Rice for his left knee in July of 2002, but denied that the injury was not from playing basketball. Dr. Rice's records specifically refer to a basketball game. He also recalls the basketball injury in December of 2004, where he injured his left upper extremity.
7. On July 29, 2002 a functional capacity exam ("FCE") reveals Claimant compliant in only two exercises. Subsequently, Claimant returns to Dr. Tate who again notes positive Waddell's signs and symptom magnification. She assigns no

permanent partial disability (“PPD”) to the reported injury.

8. Five months later, Claimant goes to Christian Hospital on his own, on December 11, 2002. He complains of right-sided low back pain and is given Vicodin. Dr. Kopp advises that the lumbar pain was not related to work at that time, and returned him to regular duty.

9. On that same day, Claimant sees Dr. Culligan, a chiropractor, privately. Claimant's symptoms were noted as aggravated by “everyday normal activities.” Dr. Culligan has no history of any prior low back injuries. Dr. Culligan treats Claimant from the end of December through January 9, 2003. According to the records, during this time, he complains of *left sided* low back pain. At trial, Claimant testified that his low back pain has always been on the right side, and that he told Dr. Culligan his pain was on the right side.

10. Claimant returned to Dr. Kopp on March 18, 2003 for a hand evaluation. No back complaints are noted.

11. On January 10, 2003, Claimant is sent to Dr. Poetz and complains of right-sided low back pain. Dr. Poetz diagnoses a lumbar strain, and then simultaneously recommends an MRI but also assigns a PPD rating of 20% PPD.

12. Thereafter, on March 16, 2004, noting chronic back pain and an unremarkable MRI. It is noted that clinically he looks well and moves about smoothly, sits up and squats...from no problem, and moves readily on and off the exam table. He is returned to regular duties. He is on no other medications except Tylenol.

13. Another FCE on March 22, 2004 places Claimant at the light to medium demand level. Also noted is submaximal effort and self-limiting behavior.

14. Concentra notes from April 1, 2004 refer to the FCE and the exaggerated behavior, very poor effort or voluntary submaximal effort. Claimant cannot return to work until he can demonstrate the ability to return to work. Claimant testified that this is the last day he worked at Employer. On June 14, 2004, Dr. Culligan released Claimant from treatment. On June 16, 2004, Concentra records note Claimant is allowed to return to work normal duty.

Prior Injuries to Low Back

15. Claimant testified that he had an injury in the 1980's to his lower back. He believes it was related to Employer and that he had physical therapy. He did not have any surgery associated with that injury. He testified he had no ongoing complaints in association with that injury. He testified he recalled seeing Dr. Rice for his left knee in July of 2002, but denied that the injury was not from playing basketball. Dr. Rice's records specifically refer to a basketball game. He also recalls the basketball injury in December of 2004, where he injured his left upper extremity.

16. Claimant testified that he had an injury in the 1980's to his lower back. He believes it was related to Employer and that he had physical therapy. He did not have any surgery associated with that injury. He testified he had no ongoing complaints in association with that injury.

17. Claimant sustained a motor vehicle accident on either May 8 or May 12 of 2001. He saw Dr. Rice on May 22, 2001 and complained of mid and low back pain. He was diagnosed with right-sided low back pain. He was sent to physical therapy and returned to work on July 11, 2001. He was discharged from physical therapy on July 26, 2001, with noted right-sided lumbar complaints.

RULINGS OF LAW

Nature and Extent of PPD

A review of the records reveals that despite two years of treatment, there is no change in pain complaints or progress until December 9, 2004 when he no longer has any low back complaints. The record is replete with variations between

Claimant trial testimony and history and symptoms recorded in the large records exhibits placed in evidence.

While Claimant recalls testifying at deposition to radiation of pain down the right leg, medical records reveal no complaints of radiating pain. Similarly, he also recalls testifying that he no longer played softball or basketball since he hurt his back on March 13, 2002. Again, the records reveal a history of playing basketball both after his injury, on July 8, 2002 and a month after the deposition, on December 22, 2004.

On December 9, 2004, Claimant sees his personal care physician and advises that "his back does not hurt at all anymore." Dr. Rice opines that the low back pain has resolved and that he can return to work full duty with no restrictions. He returns to work full duty on December 15, 2004.

According to the medical records, Claimant did not tell SSM or Dr. Culligan about his prior low back problems from the motor vehicle accident. Claimant testified that he did tell Dr. Culligan about this accident despite records to the contrary. In Dr. Poetz's report, Claimant advised that the motor vehicle accident caused cervical and thoracic problems, not lumbar problems. Dr. Tate's April 8, 2002 noted and Claimant's testimony at trial, he told Dr. Tate that he injured his upper back pain, not lower back, from the 2001 motor vehicle accident.

In addition, Claimant recalled testifying in deposition that the motor vehicle accident caused upper neck, chest and shoulder problems and that he injured no other body parts. During trial, he testified that his injury from the motor vehicle accident was to his upper back, not his lower back. A review of the medical records reflects treatment to the lumbar spine, not the upper back. Claimant maintained he injured his upper back and not his lower back, even after questioned at trial about the medical records clearly referring to the lower back.

At trial, he testified that he was able to complete all his job duties as an assembler. He is currently building fronts, lifting fronts, using air-hand guns and working full time, 10-hour shifts.

Opinion Evidence

Claimant's expert, Dr. Poetz, opines that Claimant sustained a 20% PPD, based on his examination, the history Claimant related to him, and the records he reviewed. Dr. Poetz's examination finds very little in the way of objective complaints. In addition, although Claimant advised the doctor about his motor vehicle accident in 2001, he also advised that injury was to the upper back, when in fact, injury and treatment was to the lower back. During his visit to Dr. Poetz on January 10, 2002, Claimant complains of right-sided low back pain. However, the month prior, from December 14, 2002 through January 9, 2002, the day before he is seen by Dr. Poetz, he complains of left sided low back pain.

During trial, he testified that his low back pain has always been on the right side. In addition, the objective testing, including the x-ray and MRI of the lower back are negative. The history provided by Claimant and relied on by Dr. Poetz is inconsistent, and unreliable. In addition, Dr. Poetz simultaneously recommends an MRI and gives a permanent disability rating, which appears inherently inconsistent. Dr. Poetz does not recommend specific work restrictions, only advising that Claimant should avoid heavy lifting and strenuous activity.

In contrast, employer's expert, Dr. Tate, opines that Claimant sustained no permanent disability. Dr. Tate was also misinformed by Claimant regarding the location of his back complaints from the 2001 motor vehicle accident. However, each time Dr. Tate, the treating physician, sees Claimant, she consistently notes the positive Waddell's signs, symptom magnification, and subjective complaints without objective findings. Dr. Tate's opinion that Claimant is not permanently disabled is consistent with Claimant's testimony, and various medical records.

Claimant's testimony regarding his symptoms and history is inconsistent with the treatment records of several different providers. He advised SSM that he never had any prior back complaints. He then advised several different physicians that his motor vehicle accident in 2001 involved his upper back, when in fact it involved his lower back. At trial, he maintained that his prior accident involved his upper back, despite being confronted with records that clearly reflect treatment to the lower back. Claimant's complaints referable to radiation are also questionable. At no point in the medical record does he complain of radiation, or right lower extremity symptoms. However, he testified that he had these complaints both at his deposition and at trial. These complaints simply are not credible.

Currently, he is able to complete all his job duties as an assembler. He is building fronts, lifting fronts, using air-hand guns and is working full time, 10-hour shifts. All of the evidence seems to be consistent with Dr. Tate's opinion that Claimant has no permanent disability. It is clear from the testimony, the records and the facts found here that Dr. Tate's opinion regarding PPD is supported by substantial competent evidence. Claimant has no permanent disability in relation to his March 13, 2002 injury.

Temporary Total Disability

Workers' compensation law does not provide a definition of the term "temporary total disability." Herring v. Yellow Freight System, Inc., 914 S.W2d 816, (App.1995). TTD benefits are not warranted once an employee's medical condition has reached the point where further progress or healing is not expected. Strate v. Al Baker's Restaurant, 864 S.W.2d 417 (App.1993). This is commonly referred to as being at "maximum medical improvement." Workers' Compensation Law and Practice, 29 Mo. Prac. §5.20, 1997.

The employer and employee stipulate that Claimant was paid \$1,090.28 in TTD, from the date of his accident through April 8, 2002. Dr. Tate released Claimant at MMI with no restrictions on April 15, 2002. Two months after this, on June 8, 2002, medical records reflect that Claimant was playing basketball. Employer sent Claimant back in September of 2002, and Dr. Tate did not change her opinion. Claimant went on his own to Christian Hospital on December 11, 2002, and saw Dr. Culligan that same day. Neither provider took Claimant off work. Neither provider was chosen by Employer, but rather was chosen by Claimant himself. Finally, Dr. Poetz did not specifically give any work restrictions to Claimant when he was seen on January 10, 2003.

Although his FCE on March 22, 2004, two years after his injury, reflects that he can work at a light to medium demand level, it also noted self-limiting behavior, submaximal effort and symptom/disability exaggeration. It is also established that he could complete the job duties of an Assembler, which he is currently doing. Records reflect he was playing basketball again on December 15, 2004.

Claimant has not submitted any evidence that Claimant should be off work or had specific work restrictions after April 15, 2002. Thus, it is my opinion that Dr. Tate's opinion regarding Claimant's MMI date is also probative and supported by substantial competent evidence, including the facts, records, and testimony recited above. Employer owes no additional TTD.

Unpaid Medical Expenses

Claimant also alleges Employer is responsible for unpaid medical treatment by Dr. Culligan in the amount of \$18,328.30, covering a time period from December 11, 2002 through June 14, 2004. Employer alleges that the treatment was unauthorized, unnecessary, and unreasonable. In the alternative, Employer alleges that if it is found that medical treatment is owed, that the owed amount is only \$9,164.15, pursuant to an agreement between the provider and Claimant's attorney.

There was no testimony put on by Claimant regarding the reasonableness or necessity of the treatment. In addition, Claimant did not obtain any benefit from Dr. Culligan's treatment, as evidenced by Dr. Culligan's comments within the medical records. Claimant testified that no one from Employer sent him to Dr. Culligan, but that he went on his own. He also testified that he made continuing requests to Employer for medical treatment. However, in review of the many conflicting histories Claimant has admittedly given in deposition testimony, medical records and at trial, his testimony is not credible.

As it is my opinion that Claimant was at MMI as of April 15, 2002, it follows that it is my opinion that no additional medical treatment was necessary or reasonable and that Employer does not owe any amount for Dr. Culligan's bills.

Conclusion

Accordingly, on the basis of substantial competent evidence contained within the whole record, Claimant is found to have failed to sustain his burden of proof regarding all three issues. Claim denied.

Date: _____

Made by: _____

Joseph E. Denigan
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation