

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

Injury No.: 99-157260

Employee: Roosevelt Carter
Employer: J.B. Hunt Transportation, Inc.
Insurer: Insurance Co. of the State of Pennsylvania
c/o AIG Claims Services, Inc.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: October 15, 1999

Place and County of Accident: Kansas City, Jackson County, 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. 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 April 1, 2008. The award and decision of Administrative Law Judge Mark Siedlik, issued April 1, 2008, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 18th day of November 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

FINAL AWARD

Employee: Roosevelt Carter Injury No. 99-157260
Dependents: N/A
Employer: J.B. Hunt Transportation, Inc.
Insurer: Insurance Company of the State of Pennsylvania c/o AIG Claims Services, Inc.
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Hearing Date: January 10, 2008 Checked by: MSS/pd

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: Repetitive trauma through 10/15/99.
5. State location where accident occurred or occupational disease was contracted: Kansas City, Missouri and various routes.
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: Repetitive bouncing of truck with damaged seat.
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: Lumbar spine and body as a whole.
14. Nature and extent of any permanent disability: Permanent total disability.
15. Compensation paid to-date for temporary disability: None.

On January 10, 2008, the Employee and Employer appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to Section 287.110. The Employee, Roosevelt Carter, appeared in person and with counsel, Timothy P. O'Mara. The Employer appeared through David Reynolds and Sabrina Merritt. The Second Injury Fund appeared and was represented by Meredith Moser. The primary issues the parties requested the Division to determine were whether Mr. Carter suffered an accident arising out of and in the course and scope of his employment, whether there was notice to the Employer, whether he sustained any temporary or permanent disability, whether the Employer is responsible for past and/or future medical, and whether there is any Second Injury Fund liability. For the reasons noted below, I find that Mr. Carter sustained a compensable accident between September 1, 1999 and October 15, 1999, that his disability is a permanent total disability, the Employer is responsible for temporary total and permanent disability benefits, and past and future medical benefits. The Second Injury Fund has no liability.

Employee's Exhibits:

1. Deposition Testimony of Dr. Volarich (1/24/04)
2. Dr. Volarich's Report of October 29, 2007
3. Deposition of James England (3/20/07)
4. DePaul Health Center records
5. Dr. Scott Anderson's records
6. Dr. Paul Sheehan's records
7. ProHab's records
8. Dr. Daniel Kitchens' records
9. Dr. Joshua Dowling's records
10. North Kansas City Hospital's records
11. Christian Hospital's records
12. Center for Interventional Pain Management's records
13. Cigna's liens

Employer's Exhibits:

- A. Deposition Testimony of James Stanley (7/18/03)
- B. Deposition Testimony of Tim Hudspeth (7/18/03)
- C. Deposition Testimony of Mark Whitehead (7/18/03)
- D. Deposition Testimony of Dr. Scott Anderson (1/30/04)
- E. Deposition Testimony of Dr. Bernard Randolph (4/12/04)
- F. Deposition Testimony of Dr. Bernard Randolph (10/3/07)
- G. Deposition Testimony of Liala Slaise (10/5/07)
- H. Certified Prior Division of Workers' Compensation Records
(Admitted as to Employee, Admitted as to Second Injury Fund with the exception of the independent medical report of Dr. Jeffrey Schierer, which lacked foundation as to the Fund based on the lack of supporting deposition testimony.)
- I. Certified Records of Missouri Department of Vocational Rehabilitation
- J. Certified Records of Phoebe Putney Memorial Hospital Emergency Room
- K. Certified Records of Metropolitan Orthopedics
- L. Certified Records of Missouri Baptist Medical Center
- M. Certified Records of Concentra Medical Centers
- N. Certified Records of The Work Center
- O. Certified Records of Metro Imaging
- P. Certified Records of Christian Hospital Northwest

- Q. Certified Records of Dr. Sandra Tate
- R. Certified Subsequent Employment Records of Rush Trucking Company
- S. Video
- T. Photos
- U. Photos (Objected to and not admitted into evidence.)

Second Injury Fund: No exhibits.

STIPULATIONS

The parties stipulated:

- 1) that on or about October 15, 1999, J.B. Hunt Transportation was an employer operating under the provisions of the Missouri workers' compensation law and that its liability under said law was fully insured by AIG;
- 2) that on or about October 15, 1999, Roosevelt Carter was an employee of J.B. Hunt Transportation working under the provisions of the Missouri workers' compensation law;
- 3) that the employee's contract of employment was made in Missouri;
- 4) that the employee's claim was filed within the time allowed by law;
- 5) that Employee's average weekly wage was approximately \$867.72, making a temporary and permanent total disability rate of \$578.48 and a permanent partial disability compensation rate of \$303.01.

ISSUES

The issues to be determined by the hearing are as follows:

- 1) Was there an accident or occupational disease on or about October 15, 1999?
- 2) Was notice required and/or provided by Claimant to Employer?
- 3) What temporary total disability liability, if any, does the Employer/Insurer have to the Claimant?
- 4) Whether past medical bills are payable by the Employer/Insurer.
- 5) What, if any, future medical treatment should the Employer/Insurer provide to Claimant?
- 6) What is the nature and extent of permanent disability resulting from the alleged work injury of October 15, 1999?
- 7) What is the liability of the Second Injury Fund?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A final hearing was held on January 10, 2008 before Administrative Law Judge Siedlik. Claimant appeared in person and through counsel, Mr. Timothy O'Mara. The employer and insurer were represented by counsel, Mr. J. David Reynolds and Ms. Sabrina Merritt. The Second Injury Fund was represented by counsel, Ms. Meredith L. Moser.

Mr. Roosevelt Carter is a 54-year-old worker who lives in St. Louis, Missouri with his wife, Wanda, and two sons, ages 15 and 21. Mr. Carter testified that he attended high school in Barbados, West Indies. Since high school, he has completed technical training in television and radio repair as well as truck driving school. He attempted an additional educational program on computer repair including hardware and software components with Missouri Vocational Rehabilitation following his injury at J.B. Hunt Transport but was unable to complete the program due to the severe pain in his low back.

Mr. Carter worked in the television and radio repair field from approximately 1977 until 1984. He began driving a truck in approximately 1987, first for Sygma, then for National Freight. He worked for J.B. Hunt Transport for approximately 10 to 11 years as a truck driver before his work injury in late 1999.

While driving for J.B. Hunt Transport on route from St. Louis to Kansas City in early September of 1999, Mr. Carter experienced a loss of air pressure in his air-ride seat. He testified that he felt immediate pain in his low back when the seat lost pressure. He continued to have instances where the seat would lose air pressure on several more occasions. He was driving a cab-over type tractor at that time, where the cabin sat directly over the engine. Mr. Carter testified that he told his dispatcher, Jim Stanley, when the seat initially lost pressure. Mr. Stanley indicated that there were no available trucks to switch out with Mr. Carter. Mr. Carter continued to attempt driving the truck. Records from J.B. Hunt Transport available in the deposition of Mark Whitehead demonstrate that on October 7, 1999, Mr. Carter's seat was indeed repaired.

Mr. Carter had begun wearing a back brace following the initial loss of air pressure in the seat and saw his personal physician, Dr. Scott Anderson. Dr. Anderson's deposition was taken on January 30, 2004. On that date, the doctor confirmed that there are times when the notes he dictates are inaccurate (Anderson 2004, pg. 10, ln. 24). In this case, the notes would appear to be inaccurate as all the remaining medical information indicates the low back pain began approximately two *months* before the visit with Dr. Anderson in November of 1999, not two years as was mistakenly put in a treatment note.

Mr. Carter continued to have problems with his low back. He left his employment with J.B. Hunt Transport in November of 1999. He was referred to orthopedic surgeon Dr. Paul Sheehan. On April 8, 2000, Dr. Paul Sheehan performed an L5-S1 anterior laminectomy and fusion with insertion of BAK cages and a left iliac crest bone harvest. Mr. Carter attempted to work for Rush Trucking in a "no touch" driving position in February of 2001 following his first low back surgery. He continued to have problems with the low back and ultimately left Rush Trucking in December 2001 when Dr. Sheehan recommended additional low back surgery. On December 11, 2001, Dr. Sheehan performed an L4-L5 anterior laminectomy and fusion with insertion of BAK cages and a right superior iliac crest bone harvest. Mr. Carter never returned to work following the second low back surgery.

Mr. Carter did have some prior medical procedures. Medical records refer to a remote "pinched nerve" surgery which was performed in the 1970's in Boston. Mr. Carter testified and the medical records bore out that surgery was successfully performed with no residual physical limitations.

On December 20, 1993, Dr. Charles Mannis performed an arthroscopic acromioplasty of the right shoulder. This was handled as a workers' compensation matter. Mr. Carter testified that he returned to full-time, full-duty work. Dr. Mannis issued no permanent work restrictions related to the right shoulder. Mr. Carter returned to his regular employment following treatment for this injury.

On February 7, 1997, Dr. Barry Samson performed an anterior cervical discectomy and fusion at C4-C5. Dr. Samson's medical records of April 7, 1997 indicate Mr. Carter at that time had no symptoms, no arm pain, no neck pain, no hip pain and wished to return to work. Mr. Carter was released from Dr. Samson's care on May 19, 1997 with no work restrictions. Of note, Mr. Carter returned to the same job and received no special accommodations from his employer per his testimony.

Mr. Carter's recovery from the 1999 low back injury was not so smooth. The vocational rehabilitation records are replete with documentation that Mr. Carter had low back pain problems that prevented him from attending class and slowed his progress throughout his study of computers. In fact, the records indicate – and Mr. Carter testified – that he had to discontinue his vocational rehabilitation because his low back problems became too significant for him to continue.

Mr. Carter has continued to seek ongoing treatment for his low back pain throughout the period from 1999 to the present. In 2005, Dr. Gurpeet Padda performed several pain management injections to Mr. Carter's low back. On August 18, 2005, Dr. Padda noted in his medication records that Mr. Carter's low back pain was relieved with rest and recumbency. Dr. Daniel Kitchens noted on October 24, 2006 that Mr. Carter had normal range of motion with no tenderness to palpation in both neck and shoulders, while he continued to report low back pain with range of motion testing along with tenderness to palpation in the low back.

Secondary to Mr. Carter's continuing low back problems, Dr. Joshua Dowling permanently implanted a dual 8-contact lead percutaneous electrode spinal cord stimulator with Restor rechargeable pulse generator on May 31, 2007. He noted as recently as September 13, 2007 that Mr. Carter continued to have limited range of motion of the low back with pain and, even with an adjustment of the spinal cord stimulator, was not able to obtain low back pain relief.

Mr. Carter exhibited severe low back pain throughout the hearing, having to rotate between sitting and standing on a frequent basis. Additionally, there were several times where he was observed to lean against the wall for low back support and stretch his low back throughout the proceedings. He admitted that he had not taken his normal dose of 20 milligrams of Oxycodone every four hours because the medication would have rendered him unable to focus or answer questions. Mr. Carter testified that he was severely limited by his low back pain and acknowledged that he is unable to remain in a particular position for a long period of time including the need to lie down at times throughout the day due to low back pain.

Mrs. Carter also testified and corroborated her husband's minimal level of functioning with his low back pain and problems.

Mr. Carter's restrictions and residual physical condition from his injury to the low back, considered alone and of itself, results in permanent total disability.

Under the Missouri Workers' Compensation Act, total disability is defined as the inability to return to any employment. Messex v. Sachs Elec. Co., 989 S.W.2d. 206, 210 (Mo. App. E.D. 1999). The words "inability to return to any employment" mean that "the employee is unable to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment." Kowalski v. M-G Metals and Sale, 631 S.W.2d. 919, 922 (Mo. App. S.D. 1982). The primary determination for permanent total disability is whether the employee is able to compete in the open labor market. Messex, 989 S.W.2d. at 210. A determination of permanent total disability focuses on the ability or inability of the employee to perform the usual duties of various employments in the manner that such duties are customarily performed by the average person engaged in such employment. Gordon v. Tri-State Motor Transit, 908 S.W.2d. 849 (Mo. App. S.D. 1995). There are many factors that may be considered in this assessment including a claimant's physical and mental condition, age, education, job experience and skills in order to determine whether a claimant is permanently and totally disabled. See Tiller v. 166 Auto Auction, 941 S.W.2d. 863 (Mo. App. S.D. 1997).

Most critically, Missouri worker's compensation law requires that the Administrative Law Judge in performing this analysis first determine the extent of disability from the last injury alone. Stewart v. Johnson, 398 S.W.2d 850, 852 (Mo. 1966); RSMo. 287.220.1. As a portion of that analysis, the "claimant's credible testimony as to work-related functioning can constitute competent and substantial evidence" for consideration by this tribunal. Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 224 (Mo. En Banc 2003).

Dr. Bernard Randolph examined Mr. Carter on behalf of the employer/insurer and provided deposition testimony on two occasions. Dr. Randolph opined in his report that Mr. Carter's low back injury was

degenerative in nature and not related to his work at J.B. Hunt Transport, although he did issue a rating of 35% to the body for the degenerative lumbar spine condition. Dr. Randolph did perform a physical examination in which he noted there were no significant negative findings with regard to Mr. Carter's cervical spine region (Ex. E, Randolph 2004, pg. 16, ln. 21-22).

Dr. Randolph also admitted that many people who have degenerative disc disease have no effects of their activities (Id. pg 30, ln. 21 – pg. 31, ln. 2). This is consistent with Mr. Carter's testimony regarding his history of having no problems with his low back until the triggering event of his repetitive driving on a broken seat with J.B. Hunt Transport.

Dr. Randolph went on to admit that Mr. Carter had failed back syndrome based on the two low back surgeries performed subsequent to his 1999 work injury (Id. pg. 38, ln. 2-13). Dr. Randolph opined that he would recommend Mr. Carter be able to alternate sitting and standing on an as-needed basis based solely on his low back condition (Id. pg. 39, ln. 12-20). Finally, it is noteworthy that Dr. Randolph explicitly and appropriately deferred to a vocational expert with regard to opinions related to Mr. Carter's employability and reasons for same despite his stated opinion that Mr. Carter could work in the light to sedentary category (Ex, F, Randolph 2007, pg. 39, ln. 11-13).

Dr. David Volarich evaluated Mr. Carter at the request of Mr. Carter's attorney. Of particular note, Dr. Volarich saw Mr. Carter only once in January of 2003, before all of Mr. Carter's rehabilitation and treatment was completed on his low back. Dr. Volarich opined that at that time, assuming no additional treatment to the low back, he would provide a disability rating of 75% to the body for the low back condition alone. Dr. Volarich did indicate that the work injury at JB Hunt Transport necessitated the two lumbar fusion surgeries (Ex. 1, Volarich 2004 pg 8, ln. 15-23).

Dr. Volarich indicated that he believed as a medical doctor that with good rehabilitation Mr. Carter would be able to return to sedentary employment based on his low back condition alone (Id. pg 13, ln. 12-16). Dr. Volarich did admit that he was not a licensed vocational expert (Id. pg. 37, ln. 10-11). Furthermore, Dr. Volarich admitted that Mr. Carter indicated he had low back pain twenty-four hours a day, seven days a week related to his work injury in 1999 (Id. pg 37, 17-22). Dr. Volarich also admitted that Mr. Carter had been, and continued to be, on narcotic medication throughout his treatment for the low back injury in 1999 when he hadn't been taking any kind of narcotic prior to 1999 (Id. pg 37, ln. 24 – pg. 38, ln. 6). Dr. Volarich admitted that Mr. Carter had no limitations on sitting and standing prior to September 1999 (Id. pg. 38, ln. 7-9). Finally, Dr. Volarich admitted that Mr. Carter had no problems with his gait prior to September 1999 despite myriad problems with gait following the low back injury (Id. pg. 38, ln. 11-18). Dr. Volarich admitted by virtue of his October 29, 2007 letter that multiple procedures designed to cure and relieve the 1999 low back injury including injections, physical therapy and placement of a permanent spinal cord stimulator were performed following his evaluation in 2003.

Vocational Consultant James England examined Mr. Carter on two different occasions. Mr. England reported Mr. Carter had been able to return to his regular job after pinched nerve surgery in approximately 1982 and neck surgery in 1996 (Ex. 3, England 2007, pg. 15, ln. 12-24). Mr. England reported, consistently with Mr. Carter's testimony, that Mr. Carter's low back pain went into his legs at times and was exacerbated if Mr. Carter stayed in one position very long or if he tried to be too physically active (Id. pg. 17, ln. 22-25).

By the second time Mr. England interviewed Mr. Carter, Mr. Carter was taking Oxycodone three times per day and had a Fentanyl pain patch, both of which were for his low back pain (Id. pg. 27, ln. 22-25). Mr. England admitted that level of narcotic pain medication use in and of itself would likely cause concern for an employer with regard to the need to have employees who are awake and alert (Id. pg. 54, ln. 10-16). Mr. England admitted the vocational rehabilitation records demonstrated that Mr. Carter had to discontinue his computer studies due to his low back pain (Id. pg 56, ln. 9-15).

Mr. England described the circumstances of the second interview with Mr. Carter as ones in which Mr. Carter appeared to be so unsteady on his feet that he might fall down just moving around the room in regular movements (Id. pg. 55, In. 17-25). Mr. England acknowledged an employer who is afraid a potential worker will fall down when he or she is at a pre-employment job interview is unlikely to look favorably on hiring that worker (Id.). Ultimately, Mr. England admitted that, vocationally, the need to lie down unpredictably throughout the day would, in and of itself, eliminate someone from the open labor market (Id. pg. 57, In. 17-20).

Employer/Insurer offered the testimony and report of vocational consultant Liala Slaise. Ms. Slaise acknowledged that day-to-day levels of functioning can have a big impact on vocational prospects (Ex. G, Slaise 2007, pg. 30, In. 15). She acknowledged that none of Mr. Carter's treating physicians had issued permanent work restrictions for his prior medical treatment before the work injury of 1999 (Id. pg. 34, In. 1-23). Ms. Slaise agreed that the vocational rehabilitation records documented Mr. Carter was unable to complete his computer studies due to pain in his low back (Id. pg. 35, In. 22-25). This was consistent with Mr. Carter's testimony. Ms. Slaise acknowledged that if Mr. Carter was having difficulty with sleep it could affect his ability to report to work on a consistent basis (Id. pg. 37, In. 13-15). Mr. Carter testified that he is often awakened by low back pain and that if he gets four hours of sleep it is a "good night."

Ms. Slaise went on to acknowledge that Mr. Carter's taking Oxycodone would create hiring concerns for potential employers (Id. pg. 38, In. 1-4). Mr. Carter testified that he was on no medication prior to his 1999 work injury and that the Oxycodone was prescribed and taken for his low back condition. In fact, Mr. Carter testified that the reason he didn't take the Oxycodone prior to the hearing was because it rendered him virtually incoherent and unable to respond timely and appropriately to questions. That testimony corroborates the opinion of Ms. Slaise that the level of narcotic medication Mr. Carter was taking for his low back would present a problem with potential employment. Ms. Slaise testified that the need to lie down throughout the day is an unacceptable work practice (Id. pg. 43, In. 23 – pg. 44, In. 1). She also acknowledged that it was unlikely an employer would offer employment to someone who was constantly up and down in their chair and leaning against a wall due to low back pain during an interview (Id. pg. 43, In. 11-22).

I find Mr. Carter and his wife's testimony regarding his day-to-day level of functioning to be credible. The severe problems they describe with sleep, activity and pain management are consistent with the over eight years of invasive medical treatment following and related to Mr. Carter's work injury to his low back in 1999. This treatment for the primary injury included two fusion surgeries, multiple pain management injections, physical therapy, permanent spinal cord stimulation and very significant narcotic pain medication. Several doctors in the case including Dr. Reynolds, Employer/Insurer's rating physician, opined that Mr. Carter had failed back syndrome based on the surgeries to his low back following the primary injury. Dr. Volarich clearly relates both surgeries to the primary work injury at J.B. Hunt Transport.

Both vocational opinions offered in the case, one by the employee and one by the employer/insurer, indicate that the levels of functioning described and demonstrated by Mr. Carter are inconsistent with employment. Notwithstanding the face of the reports provided by medical-legal or vocational-legal experts, the deposition testimony of those individuals makes clear that the impact of the low back problems on Mr. Carter was so severe as to take him out of the labor market when taken in and of themselves.

It is well established that the burden of proof of entitlement to temporary total disability is on the claimant. Cooper v. Medical Center of Independence, 955 S.W.2d 570 (Mo.App. 1997). In determining whether an employee is totally disabled, the main issue is whether any employer, in the usual course of business, would reasonably be expected to employ the claimant in their present physical condition. Boyles v. USA Rebar Placement, Inc., 26 S.W.3d 418 (Mo.App. 2000). I found based on the reading of the evidence presented,

the Claimant was temporarily and totally disabled and entitled to benefits to be paid from the Employer from December 10, 1999 to January 22, 2001 and from December 11, 2001 to January 22, 2003, at which time Dr. Volarich opined the Employee to be at maximum medical improvement.

An employer is required to furnish such medical treatment as is necessary to cure and relieve the claimant from the effects of work-related injuries pursuant to Section 287.140 RSMo. It is Employee's burden to prove that he is entitled to past medical expenses and future medical aid. Sams v. Hayes & Adhesive, 260 S.W.2d 815 (Mo.App. 1952). The parties in this matter stipulated the medical treatment and bills were reasonable and necessary, and this is consistent with the testimony of Dr. Volarich who opined the medical bills were, in fact, reasonable and necessary to cure and relieve the claimant's condition. The claimant further has a burden to demonstrate a reasonable probability the future medical treatment is needed because of the work injury, although evidence of specific treatment which may be needed is not required. ABB Power v. Kemper, 236 S.W.3rd (Mo.App.W.D. 2007). I find based on the parties' agreements and stipulations the medical expenses which the claimant incurred are to be paid by the employer/insurer. I further find based on the cumulative evidence presented that the claimant has met his burden of proof to establish the need for future medical care to cure and relieve the effects of the injuries and subsequent surgeries to his back and whole body.

Because I am compelled by statute to first assess the impact of the 1999 work injury, I find that Mr. Carter is permanently and totally disabled by virtue of his work injury at J.B. Hunt in isolation and award benefits accordingly. As a result, I find there to be no liability attributable to the Second Injury Fund.

This Award is subject to a lien of 25 percent of sums recovered and to be recovered in favor of Claimant's counsel, J. Mark Kell.

Date: _____

Made by: _____

Mark S. Siedlik

Administrative Law Judge

Division of Workers' Compensation

A true copy: Attest:

Jeff Buker

Director

Division of Workers' Compensation