

FINAL AWARD ALLOWING COMPENSATION
(Modifying Award and Decision of Administrative Law Judge
and Denying Motion for Costs)

Injury No.: 00-072366

Employee: Phillip Hiatt
Employer: J.B. Hunt Transport Inc.
Insurer: American Home Assurance Company
Date of Accident: May 8, 2000
Place and County of Accident: Clay 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. We have reviewed the evidence, read the briefs of the parties, and considered the whole record. Pursuant to section 286.090 RSMo, the Commission modifies the award and decision of the administrative law judge dated October 13, 2004. The award and decision (decision) of Administrative Law Judge Mark S. Siedlik is attached hereto for reference. Except as indicated otherwise below, this Commission adopts the Findings of Fact as set forth in the decision.

INTRODUCTION

On April 3, 2001, administrative law judge issued a Temporary Award finding that employee sustained an accident arising out of and in the course of employment on May 8, 2000. The Temporary Award directed employer and insurer to pay temporary total disability benefits until such time as employee was released from care of his treating physicians and to "pay for the continued treatment consistent with the orders of Dr. Dubinsky, his current treating physician." On August 10, 2001, the Commission affirmed that Temporary Award.

On August 5, 2004, this matter came for a final award hearing before the administrative law judge. On October 13, 2004, the judge issued his final award. In his decision, the judge concluded that employee was permanently and totally disabled and awarded him \$578.48 per week in benefits for the balance of employee's life and ordered employer and insurer to provide him "all the medical care needed in the future to cure and relieve the injured Employee from the effects of his injury."

The administrative law judge further determined that employer and insurer had not adequately explained why they failed to pay \$32,935.96 of employee's medical bills that were reasonably needed to cure or relieve employee from the effects of his injury or why they failed to timely pay employee's temporary total disability benefits of \$578.48 per week during the period April 1, 2004, through May 13, 2004 (which benefits they subsequently paid). Consequently, the judge ordered employer and insurer to pay the past unpaid medical bills in the amount of \$32,935.96 and also invoked the penalty provisions of section 287.510, RSMo to double the medical amount employer and insurer had previously not paid and to double the six weeks of temporary total disability benefits.

Employer and insurer filed an Application for Review with the Commission. The Application for Review does not dispute employee's permanent and total disability nor their liability for past due medical expenses. Instead, the Application contends that the administrative law judge should not have applied the doubling provisions of section 287.510 to the facts of this case.

On March 17, 2005, employee filed with the Commission a Motion for Costs for Frivolous Appeal. In this motion, employee's counsel alleges that the Application for Review of employer and insurer is frivolous and asks for attorney's fees in the amount of \$1000.00.

After reviewing the entire record, the Commission denies employee's motion to assess legal costs against employer and insurer. Furthermore, the Commission affirms the findings and legal conclusions of the administrative law judge as to employee's permanent total disability and employee's right to continue receiving weekly benefits therefor during the balance of his life; employer's and insurer's liability to provide all medical care needed in the future to cure and relieve employee from the effects of his injury; and employer's and insurer's additional liability under section 287.510. Because we disagree with the administrative law judge's calculation of the amount of that additional liability under section 287.510, though, we must modify that portion of his decision as set forth below.

MOTION TO ASSESS COSTS FOR FRIVOLOUS APPLICATION TO COMMISSION

Section 287.560, RSMo states in relevant part: "[I]f the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them."

Employee's motion to assess such legal costs against employer and insurer in this case, then, depends on whether employer and insurer had reasonable grounds for filing their Application to the Commission.

Although it has subsequently been amended, the provisions of section 287.510 pertaining to the case at hand state as follows:

In any case a temporary or partial award of compensation may be made, and the same may be modified from time to time to meet the needs of the case, and the same may be kept open until a final award can be made, and if the same be not complied with, the amount thereof *may* be doubled in the final award, if the final award shall be in accordance with the temporary or partial award. [Emphasis added.]

As can easily be seen from the emphasized language above, the decision as to whether or not to double an award for noncompliance is optional, not mandatory. It was within the administrative law judge's discretion to impose this penalty provision. Thus, it stands to reason that the Commission might exercise this question of discretion differently than the judge.

Accordingly, we conclude that employer and insurer had reasonable grounds for filing their Application to this Commission. Therefore, we deny employee's motion to assess costs against employer and insurer.

DOUBLING PENALTY UNDER SECTION 287.510

In the case before us, employer and insurer provided little excuse for their failure to pay employee's medical expenses in the amount of \$32,935.96 and no excuse for their interruption and delay in payment of six weeks of his court-ordered temporary total disability benefits. Even if the actions or omissions of employer and insurer were due to inattention or disorganization, "the employer's reasons for nonpayment are irrelevant, and we see no need to graft a requirement of ill-will or purposefulness onto the statute" *Shaw v. Scott*, 49 S.W.3d 720 (Mo. App. W.D. 2001). Accordingly, we agree with the administrative law judge that imposition of the doubling penalty set forth in section 287.510 is appropriate.

On the other hand, we disagree with the administrative law judge's calculations concerning that penalty. Courts of this state have previously considered section 287.510. Those courts have determined that if the penalty is assessed, it doubles the entire amount awarded under the temporary award, not just that portion that the employer or insurer failed or delayed in paying. *Shaw*, 49 S.W.3d at 727; *Sutton v. Vee Jay Cement Contracting Co.*, 37 S.W.3d 803, 810 (Mo. App. E.D. 2000); and *Hendricks v. Motor Freight Corp.*, 570 S.W.2d 702, 710 (Mo. App. 1978).

Accordingly, we conclude that employer and insurer are liable to pay double employee's medical expenses of \$32,935.96. They are also liable to pay double the entire amount of temporary total disability benefits to which employee was entitled as the result of the April 3, 2001, Temporary Award.

The Temporary Award indicated that employee's last day of work for employer was May 25, 2000. Thus, employee's temporary total disability benefits should have begun May 26, 2000. Dr. Richard M. Dubinsky documented on July 23, 2002, that employee had reached maximum medical improvement. (Tr. 469.) Using these two dates as the beginning and ending dates for employee's temporary total disability benefits, employee was entitled to 112 and 5/7 weeks of temporary total disability benefits (112 5/7 X \$578.41), totaling \$65,195.07.

Therefore, in addition to paying employee the benefits and expenses to which he is otherwise entitled hereunder, we direct employer and insurer to pay the penalty authorized under section 287.510 -- \$32,935.96 + \$65,195.07, totaling an additional \$98,131.03.

CONCLUSION

We affirm the findings and legal conclusions of the administrative law judge as to employee's permanent total disability and employee's right to continue receiving weekly benefits during the balance of his life or until modified by law and affirm the liability of employer and insurer to provide all medical care needed in the future to cure and relieve employee from the effects of his injury.

We also affirm the judge's decision to penalize employer and insurer as authorized by section 287.510, but we modify the amount of that penalty. We hereby order employer and insurer to pay employee an additional \$98,131.03.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fees in this case as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 3rd day of January 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

TEMPORARY AWARD

Employee: Phillip Hiatt

Injury No. 00-072366

Dependents: N/A

Employer: J.B. Hunt

Additional Party: N/A

Insurer: AIG Claim Services

Hearing Date: February 1, 2001

Checked by: MSS/dl

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: May 8, 2000
5. State location where accident occurred or occupational disease was contracted: Clay County, 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: While getting in and out of his truck, the claimant was injured.
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: Neck, whole body.
14. Nature and extent of any permanent disability: To be determined.
15. Compensation paid to-date for temporary disability: 0
16. Value necessary medical aid paid to date by employer/insurer? \$1,749.33
17. Value necessary medical aid not furnished by employer/insurer? To be determined.
18. Employee's average weekly wages: Unknown.
19. Weekly compensation rate: \$570.41/303.01
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: To be determined.

Unpaid medical expenses:

weeks of temporary total disability (or temporary partial disability)

weeks of permanent partial disability from Employer

weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning _____, for
Claimant's lifetime

22. Second Injury Fund liability: None.

weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits

Permanent total disability benefits from Second Injury Fund:
weekly differential payable by SIF for _____ weeks beginning
and, thereafter, for Claimant's lifetime

TOTAL: To be determined.

23. Future requirements awarded: Weekly benefit and medical care.

Said payments to begin as of date of award and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Jerold Kenter

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Phillip Hiatt

Injury No: 00-072366

Dependents: N/A

Employer: J.B. Hunt

Additional Party: N/A

Insurer: AIG Claim Services

Checked by: MSS/dl

This case comes on for hearing before Administrative Law Judge Siedlik in Kansas City, Missouri. The Claimant, Phillip Hiatt, was represented by his counsel, Mr. Jerry Kenter. The employer and insurer were represented by their counsel, Mr. Bryan Groh. This case involves Claimant's request for an order directing medical treatment and the payment of weekly benefits for injuries on or about May 8, 2000. At that time the Claimant was in the employ of J.B. Hunt Transport, Incorporated, and alleges an accident within the course and scope of his employment in Clay County, Missouri. The employer and employee were subject to the Missouri Workers' Compensation Law, with the workers' compensation liability fully insured by American Home Assurance Company.

Parties agreed to compensation rates of \$578.41/\$303.01. There have been no weekly benefits paid, and medical expenses of \$1,749.33 have been paid.

The issues to be resolved are:

1. accident;
2. whether the accident arose out of and in the course and scope of employment;
3. medical causation;
4. past medical expenses;
5. future medical expenses;
6. the nature and extent of temporary total disability claimed from the period May 26, 2000, to present.

Parties stipulated and agreed as part of this proceeding no evidence on past medical expenses will be presented, the employer's group medical coverage having paid the bulk of those expenses. The parties represent a determination of compensability would resolve the past medical expense issue.

The evidence at trial consisted of the testimony of the Claimant and his wife, together with the testimony of Dr. Pratt (Employer & Insurer Exhibit No. 1); and Dr. Smith (Employer & Insurer Exhibit No. 2), together with medical records, driver's logs and correspondence comprising Claimant's Exhibits A through F and Employer & Insurer Exhibit No. 1 and 2.

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The Claimant, Phillip Hiatt, testified he was born March 4, 1956, and at the time of trial was 44 years old, with a 10th grade education and no GED. Claimant testified he attended Jay's Truck Driving School in 1997 and has been an over-the-road truck driver since leaving that school. The Claimant began work with J.B. Hunt on April 30, 1999. The Claimant testified J.B. Hunt owns the truck and trailers and the driver hauls for J.B. Hunt and is paid by the mile. Prior to being hired by J.B. Hunt, the Claimant was required to take and pass the Department of Transportation physical, which is part of the evidence of this proceeding.

The Claimant admitted that his neck, which is the subject of this proceeding, had prior problems with treatment dating back to 1985 when the Claimant was in the employ of Lady Baltimore Foods. The Claimant testified a claim for workers' compensation benefits was filed and his case was settled for approximately 5 percent to the body. The Claimant continued to periodically have problems with his neck and saw Dr. Arthur Jenny in 1999 for neck problems. Dr. Jenny's records are in evidence and indicate the Claimant saw him in August of 1999 and was diagnosed with left cervical radiculitis. Claimant underwent three epidural injections in his neck on September 7, 1999, October 21, 1999, and November 2, 1999, having missed no work from these epidurals but having minimal positive effects. The Claimant at Dr. Jenny's direction had an MRI scan of his neck done on August 2, 1999, and that MRI showed moderately severe spinal stenosis at C3-4 and C4-5 with a broad-based disk bulging. There was no evidence on the MRI taken at that time of the herniated disk in the neck. Dr. Jenny directed a letter to the Claimant's personal physician, Dr. Kim Smith, indicating in Dr. Jenny's opinion that the Claimant might be a surgical candidate and had cautioned the Claimant about hyperextension of the neck.

Claimant saw his personal physician, Dr. Kim Smith, on May 4, 2000, complaining of increasing muscle tension and discomfort in the neck. Dr. Smith after examining the Claimant did not take the Claimant off work, but allowed him to keep driving, although prescribing a neck brace. The Claimant reported for work on May 7, 2000, after having a weekend off. The Claimant was directed to take a load for J.B. Hunt to Topeka, Kansas, however, the truck he was assigned had mechanical problems and he was returned to Kansas City.

Upon receiving the assignment of a second truck, the Claimant, while climbing into the truck felt a sharp pain or stinger in his neck. The Claimant indicated that before this incident on May 8, 2000, neck pain had never prevented him from driving and he did not wear the neck brace. Prior to May 8, 2000, the Claimant further testified he could turn his head and look into his rearview mirror and was able to drive his over-the-road rig safely. After this incident on May 8, 2000, the Claimant testified the pain in his neck became worse and while en route to his delivery in Iowa, the Claimant testified the pain became so severe he stopped at his home in Edgerton, Missouri, to rest. The Claimant ultimately was assigned to drive to Chicago and was able to go as far as Altoona, Iowa, where he stopped to rest for a period of hours, ultimately driving on to Walcot, Iowa, arriving at approximately 9 a.m.

Claimant at this point believed he could drive no further because of the pain in his neck, and called his fleet manager by on-board computer in the truck and was instructed not to drive any further. The Claimant was met by an adjuster who drove the Claimant to Illinois Occupational Health Clinic located in Moline, Illinois, where he was briefly treated and prescribed

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pain medications and diagnosed with neck strain. The Claimant was instructed not to drive and was instructed to follow up with a neurosurgeon upon return to Kansas City. At that point the Claimant was given a ride to the bus station in Moline, Illinois, and returned to Kansas City by commercial bus.

Claimant was seen by Business and Industry Health Group at the employer's direction on May 12, 2000. The Claimant gave a history consistent to the treating physician indicating he had a prior history of neck pain. The assessment at the Business and Industry Clinic on May 12, 2000, was an exacerbation of the preexisting condition leading to an acute cervical strain complicated by degenerative disk disease and a possible herniation at C5-C6. At the direction of the Business and Industry staff, X rays in the cervical spine were ordered and physical therapy was prescribed.

The Claimant testified he was then assigned to office or depot duty at the J.P. Hunt facility in Kansas City while undergoing treatment at the Business and Industry Health Clinic. Claimant was given treatment in the form of physical therapy and ultrasound as well as exercises, along with instruction in a home exercise program.

At the direction of the treating physician at the Business and Industry Clinic in May of 2000, an MRI was performed, as well as the securing of the films of the prior MRI study done in 1999. While the MRI taken on August 2, 1999, showed some degenerative changes, the MRI of the cervical spine taken at Baptist Hospital on May 19, 2000, showed the disk extrusion at C5-C6, more prominent on the right, extending into the right neural foramen. The MRI taken May 19, 2000, clearly showed cord compression at C3-4 and C5-6. On May 25, 2000, the Claimant received a letter from AIG Claim Services, Incorporated, Workers' Compensation administrator, indicating their determination of his medical condition was that it did not arise out of and in the course and scope of employment and therefore further benefits and treatment under the Missouri Workers' Compensation law would be terminated.

The Claimant, who has not worked since May 26, 2000, had come under the care of Jerome Hanson, a neurosurgeon in Kansas City, who prescribed and performed surgery on August 4, 2000. Claimant had as part of this surgical procedure a cervical fusion performed and has been prescribed and is wearing a neck brace since that surgery.

The Claimant continues under treatment and is now under the care of Dr. Dubinsky at the University of Kansas Medical Center for his neck pain. The Claimant currently is on prescribed medications of Valium, amitriptyline, and Tylenol 3. The Claimant testified his daily routine involves daily naps and a limitation to any of his household activities and activities of daily living.

MEDICAL EVIDENCE

The Claimant was directed by the employer and insurer to be examined by Dr. Terrence Pratt, a physical medicine specialist, on May 25, 2000. Dr. Pratt after examining the Claimant and reviewing the history concluded that the Claimant had a multilevel neck condition prior to May 8, 2000. Dr. Pratt indicated the accident of May 8, 2000, aggravated the preexisting condition but

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the need for operative intervention was present prior to May 8, 2000. Dr. Pratt indicated at the time of his examination the Claimant should remain off work pending a neurosurgical assessment.

In the deposition of Dr. Pratt he testified in cross-examination there was a change in pathology in the neck following the May 8, 2000, accident because the MRI of August 2, 1999, showed only a bulging disk and not an extruded or herniated disk, whereas the MRI of May 19, 2000, showed herniation. Dr. Pratt testified he was unaware that the patient had passed a DOT physical exam on April 14, 1999. Dr. Pratt further admitted he did not

have all the reports from Dr. Jenny at the time of this report and at the time he performed his examination. Dr. Pratt further admitted that the accident of May 8, 2000, aggravated the neck symptoms of the Claimant.

The Claimant was also examined by Dr. J. Michael Smith for the purposes of this proceeding. Dr. Smith believed the two disk herniations in the Claimant's neck were present on the MRI of May 19, 2000, and were due to the injury of May 8, 2000. Dr. Smith in cross-examination testified there was no evidence of any disk herniation prior to May 8, 2000, in the medical records and was particularly in the MRI of August 2, 1999. Dr. Smith testified the Claimant had preexisting conditions in his neck predating the May 8, 2000, accident.

Also in evidence were the records and surgical notes of Dr. Henson who performed the cervical discectomies and partial vertebrectomies at C3-4, C4-5, and C5-6, and a cadaveric bone graft fusion at the same level on the Claimant on August 4, 2000.

FINDINGS

It is well established in the State of Missouri that the burden is on the employee to prove all material elements of the claim. Beyer v. Howard Construction Company, 736 S.W. 2d 78 (Mo.App. 1987). Further, the Commission is charged with responsibility of passing on the credibility of all witnesses and is not obliged to accept the employee's testimony as true, even though no contradictory or impeaching evidence is introduced. Keener v. Wilcox Electric, Incorporated, 884 S.W. 2d 744 (Mo.App. W.D. 1994).

I find upon review of all the credible evidence and testimony presented, the facts as best believed appear to be as follows. The Claimant on April 14, 1999, passed a DOT physical taken at the behest of the employer and insurer, after which the employer requested a second opinion as to his ability to work and subsequent to that second opinion the Claimant was allowed to work as of April 14, 1999. Prior to May 8, 2000, the Claimant was able to drive a truck and there was no evidence presented the Claimant missed work due to any neck injury. There is no question the Claimant had a history of prior cervical problems, but in examining MRI films taken September 2, 1999, contrasted with those taken May 19, 2000, after the alleged accident of May 8, 2000, there is definite change of pathology with the condition worsened to the extent that surgical intervention and cervical fusion became necessary. The Claimant's version of events, climbing into the truck, wrenching his neck causing immediate pain, was not seriously challenged by the employer and insurer, it being the employer's contention apparently that the medical condition

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was, one, in need of treatment prior to May 8, 2000, and that the May 8, 2000, incident could not and did not cause the Claimant's current need for the surgery which was performed.

I find the Claimant has met his burden of proof of establishing an accident which was job related on May 8, 2000, which necessitated the treatment which the Claimant has undergone and treatment which the Claimant continues to need. There is no question the Claimant was in the course and scope of employment climbing into the cab of his truck when this incident occurred, and when the performance of the usual and customary duties of an employee leads to physical breakdown or change in pathology, that injury is deemed compensable. Wolfgeher v. Wagner Cartage Service, Incorporated, 646 S.W. 2d 781 (Mo.banc 1983).

Even if the assumption is made that the Claimant was predisposed to a neck injury and had preexisting problems with his neck, his injury is still compensable. Aggravations on the job are clearly compensable. Kelly v. Banta and Stude Construction Company, 1 S.W.3d 43 (Mo.App. E.D. 1999); and Smith v. Climate Engineering, 939 S.W. 2d 429 (Mo.App. E.D. 1996). There is some question in the medical records as to whether the Claimant was off work for an injury prior to May 7, 2000. In fact, the Claimant had been working continuously up and to that time and returned to work on May 7 after a weekend off, not time off for physical injuries. I find with the evidence presented, including MRIs of August 2, 1999, and May 19, 2000, the evidence of return-to-work slips from two doctors on April 14, 1999, indicating the Claimant had passed the DOT physical and even had a second opinion which further cleared the Claimant to return to driving despite his neck condition leads me to conclude the Claimant suffered a compensable work-related accident on May 8, 2000. There being no credible evidence to rebut the Claimant's assertion of the injury while climbing into the cab of his truck leads me to find in favor of the

Claimant establishing a work-related accident within the course and scope of his employment and his burden of proof to establish the medical treatment, which is not seriously in dispute, was reasonable and necessary and is now the responsibility of the employer and insurer.

The Claimant was kept on office or dock duty, as he testified, up until May 25, 2000, when AIG Insurance Services upon their review deemed his condition not work related and terminated his benefits. It is from that period forward, May 26, 2000, to the present and to continue that weekly benefits are due until such time as the Claimant is released from care of his treating physicians.

The Claimant after being denied treatment by the employer and insurer sought care on his own and under the care of Dr. Henson and now Dr. Dubinsky, the Claimant had the surgical procedures done to his neck and continues under the care of Dr. Dubinsky. Having found the condition to the Claimant's neck to be work related dating to May 8, 2000, the care and treatment that the Claimant has received is deemed reasonable and necessary and is the responsibility of the employer and insurer to pay for that treatment and to pay for the continued treatment consistent with the orders of Dr. Dubinsky, his current treating physician.

I find this case is to be returned to the open docket until such time as the parties are ready to proceed for final determination. In the interim, this award is one of a temporary nature directing the employer and insurer to provide the treatment and the payment of weekly benefits as

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set forth above. I find Claimant's counsel, Mr. Jerry Kenter, is entitled to attorney's fees in the amount of 25 percent of sums recovered and to be recovered for his legal services rendered.

Date: _____

Made by: _____

Mark S. Siedlik
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Lawrence D. Leip
Director
Division of Workers' Compensation