

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

Injury No.: 05-130221

Employee: Victor Richardson
Employer: Ryan's Trucking
Insurer: CompSource Oklahoma

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 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 Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 3, 2011. The award and decision of Chief Administrative Law Judge Nelson G. Allen, issued August 3, 2011, 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 29th day of March 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Victor Richardson

Injury No.: 05-130221

Employer: Ryan's Trucking

Additional Party: None

Insurer: Comp Source Oklahoma

Hearing Date: May 18, 2011

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri

Checked by: NGA

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: September 28, 2005.
5. State location where accident occurred or occupational disease was contracted: Caldwell 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: Employee was a truck driver involved in a motor vehicle accident.
12. Did accident or occupational disease cause death? No.

13. Part(s) of body injured by accident or occupational disease: Left shoulder, cervical spine, lumbar spine, body as a whole.
14. Nature and extent of any permanent disability: Employee is permanently totally disabled.
15. Compensation paid to-date for temporary disability: \$76,666.70.
16. Value necessary medical aid paid to date by employer/insurer? \$56,414.25.
17. Value necessary medical aid not furnished by employer/insurer? \$4800.73 alleged.
18. Employee's average weekly wages: N/A.
19. Weekly compensation rate: \$696.97 for Temporary Total Disability and \$365.08 for Partial Total Disability.
20. Method wages computation: By stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable:
Unpaid medical expenses: None.
Permanent total disability benefits from Employer beginning February 26, 2009 in the amount of \$696.97 per week for the remainder of claimant's life.
22. Second Injury Fund liability: N/A.
23. Future requirements awarded: The Employer is directed to provide such future medical treatment as may be reasonable and necessary to cure and relieve claimant from the condition caused by his accident of September 28, 2005.

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Victor Richardson

Injury No.: 05-130221

Employer: Ryan's Trucking

Additional Party: None

Insurer: Compsource Oklahoma

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PRELIMINARIES

ISSUES

Prior to presenting evidence, the parties stipulated that the issues to be determined by this hearing are:

1. Nature and extent of claimant's disability.
2. Liability for past medical expenses.
3. Liability for future medical aid.
4. Liability for past medical mileage.
5. Is Employer entitled to an overpayment of TTD representing a period of time for April 12, 2007 through May 3, 2007.

The parties agreed that on September 28, 2005, Victor Richardson was an employee of Ryan's Trucking. The Employer was operating under and subject to the provisions of the Missouri Workers' Compensation law and was fully insured by Compsource Oklahoma.

The parties also agreed that on September 28, 2005, the claimant sustained an injury by accident arising out of and in the course of his employment. The employer had proper notice of claimant's injury and a timely Claim for Compensation had been filed.

The parties further agreed that the correct rate of compensation is \$696.97 per week for both temporary total disability and permanent total disability and \$365.08 for permanent partial disability. Compensation has been paid in the amount of \$76,666.70

representing a period of time from December 1, 2005 through May 7, 2007 and June 18, 2008 through February 25, 2009 for a total of 110 weeks. Medical aid has been furnished in the amount of \$56,414.25. The employer is asking for past medical aid expense in the amount of \$4800.73.

The claimant testified in person. He is 47 years old. He is well spoken and has a muscular build. He is an over-the-road truck driver. He claims to be permanently and totally disabled.

On September 28, 2005, the claimant was operating an 18-wheeler owned by the employer on Westbound U.S. 36 in Clinton County, Missouri. He had his cruise control set at 70 M.P.H. A car approached his vehicle from a side road.

The vehicle struck the claimant's front passenger wheel of his truck causing the steering wheel to violently jerk his arms and body. It pushed the tractor-trailer into the center median, striking a ditch which caused his vehicle to cross back over the West bound lane and strike another ditch and embankment on the North side of the highway causing the tractor to separate from the trailer. The tractor came to rest with the driver's side on the ground.

The tractor came to rest with the driver's side closest to the ground. Claimant testified that he was unable to use his left arm at all to get out of the vehicle and required assistance from bystanders to exit the passenger side window of the truck. He said the impact caused both of his shoes and one of his stockings to come off of his feet.

He was taken from the scene of the accident by ambulance to Cameron Memorial Hospital in Cameron, Missouri where he was hospitalized. He was taken to surgery for reduction of the fracture of his left humerus and reduction of the glenohumeral dislocation on the left. He was admitted for observation and pain control with an admitting diagnosis of "closed fracture of upper end of humerus, greater tuberosity, open wounds of hip and thigh without complications, contusion of face, scalp and neck except the eye. Face, neck and scalp abrasions, friction burns without infection. Low back pain. Puss in joint of lower leg. Puss in limb."

He was discharged by Cameron Medical Center and told to follow up with his primary care physician. He returned to his home at Lawton, Oklahoma. He was seen by his primary care physician, Dr. Love, who prescribed therapy and referred him to Dr. Stephen K. Ofori.

Dr. Ofori is a neurosurgeon. The claimant said that Dr. Ofori told him he was a surgical candidate but the claimant was then referred by the employer to Dr. Arthur Conley, M.D.

Dr. Conley's report of June 28, 2006 noted that Dr. Ofori had an MRI performed and revealed an injury to L4-5 and L5-6 and DISC injury at C3-4, C4-5 and C5-6. Dr. Ofori had recommended a three level DISC fusion to repair the cervical DISC injuries.

Dr. Conley did not recommend surgical intervention and referred the claimant be sent to a physical medicine rehabilitation center for epidural injections and sacroiliac injections and pain management.

The claimant was then seen by Dr. Darryl D. Robinson, M.D. on July 18, 2006. It should be noted that Dr. Robinson's letterhead states "Darryl D. Robinson, M.D. Specializing In Comprehensive Pain Management & Non-Operative Spine Care."

Dr. Robinson treated Mr. Richardson for chronic neck and low back pain and opined that Mr. Richardson suffered from cervical degenerative disc disease at C3-C4 and C5-C6. He also diagnosed lumbar degenerative disc disease at L3-L4 with facet arthrosis. Mr. Richardson continued to receive conservative treatment, including epidural steroid injection at C3-C4 and L3-L4. Ongoing therapy was recommended and continued through August, 2006. During this time, Mr. Richardson was still off work and was paid by the employer temporary total disability benefits. He went on to receive additional injections in September 2006 in the cervical and lumbar spine and a muscle stimulator was recommended in November 2006. Right sided facet injections were performed in the lumbar spine in December 2006. Radio frequency ablation of the medial nerve branches at L3-L4 and L4-L5 was performed in January 2007.

A functional capacity evaluation performed in March 2007 demonstrated the claimant's ability to perform medium demand level work. Specifically, it recommended that the claimant could return to work duties with the following requirements:

Pushing up to 22 pounds, pulling up to 57 pounds, lifting knuckle to shoulder occasionally up to 40 pounds, lifting floor to knuckle occasionally 50 pounds, lifting floor to shoulder occasionally 50 pounds, carrying items 30 feet occasionally weighing up to 50 pounds. It also revealed an above competitive ability to reach overhead, stoop and reach, crouch, squat and reach, perform a kneeling reach, and perform an axial rotation reach. It also revealed ability to constantly balance, to frequently stand, frequently sit, frequently walk, and occasionally climb stairs.

Dr. Robinson also provided impairment ratings of 12% of the cervical spine, 8% of the lumbar spine, representing a total impairment of 19%.

At the request of the employer, an independent medical examination was performed by Dr. Poppa in May 2007. His report stated that the claimant was able to work in the medium category physical demand, including lifting 50 pounds occasionally, 25 pounds frequently, and 10 pounds constantly. Dr. Poppa evaluated the claimant and opined that the claimant was at maximum medical improvement. He recommended further pain management and also noted that the claimant could work in the medium category lifting 50 pounds occasionally. He gave a rating of 10% permanent partial disability as it relates to the cervical spine, 12.5% permanent partial disability as it relates to the lumbar spine and pelvis, 15% permanent partial disability as it relates to the left shoulder, giving him an overall disability rating of 31% of the body as a whole.

Dr. Robinson repeated radio frequency ablation on the right side from L3-L5 in June 2008 and recommended a follow-up cervical MRI. A cervical MRI from August 2007 revealed a right sided C4-C5 disc protrusion and bulges at C2-C3, C3-C4 and C5-C6. Further radio frequency ablation on the right was performed in August 2008 and an injection was performed at C4-C5 in August 2008. Further injections were performed throughout 2008 and Mr. Richardson continued pain management treatment through Dr. Robinson. In February 2009, Dr. Robinson placed permanent restrictions on the claimant of no lifting, carrying, pushing or pulling over 10 pounds, and advised him to avoid any repetitive bending, stooping or twisting.

On April 3, 2008 claimant, on his own, went to see Dr. Francisco J. Battle, a neurosurgeon associated with the Wellspine, P.A. clinic in Dallas, Texas. Dr. Battle ordered a repeat MRI which was performed on May 30, 2008. According to Dr. Battle's 6/4/08 office note:

Radiologic examination: I reviewed an MRI of the lumbar spine dated May 30, 2008, which demonstrates a herniated nucleus pulposus paracentrally and toward the right at L4-5 approximately 304mm with right sided foraminal stenosis. There was decreased disc height and disc dessication noted at L3-4 and L4-5 as well.

Dr. Battle's 6/4/08 office record records his diagnosis as follows:

IMPRESSION:

1. Lumbar radiculopathy
2. Herniated nucleus pulposus at L4-5
3. Lumbago

Dr. Battle's recommendations, at that time, were for surgery of the low back and was documented as:

RECOMMENDATIONS: Due to failure of conservative medical therapy including physical therapy and epidural steroid therapy, facet rhizotomy, pain Duration greater than six months, current neurologic status with evidence of herniated nucleus pulposus paracentrally and toward the right at L4-5 with right sided foraminal stenosis, I do feel this patient is a surgical candidate and would benefit from a lumbar laminectomy, discectomy, foraminotomy and partial facetectomy at L4-5.

The employer then sent the claimant to Dr. John A. Munneke, M.D.

Dr. Munneke then began treating the claimant in May 2009. He indicated in his initial visit that Dr. Robinson's treatment had been helpful and that the steroid injections had given him some relief. He indicated that medication, rest, heat, cold and stretching alleviated his symptoms. Dr. Munneke initially felt that the claimant needed no further invasive pain management procedures, but that he was in the need of ongoing medical maintenance through prescriptions.

Dr. Munneke continued to treat the claimant throughout 2009, leading up to his release in 2010. At that time, Dr. Munneke found that the claimant was at maximum medical improvement and did not need any additional ongoing medical maintenance other than over-the-counter anti-inflammatory medications, and that he needed to continue his stretching exercises. He provided ratings of 10% of the body as a whole referable to the cervical spine and that 4% of this disability was due to preexisting degenerative changes with 6% of it being a result of the work injury. He found no disability with the thoracic spine and 11% of the body as a whole referable to the lumbar spine. Of this, he found that 5% was related to the preexisting degenerative disease and that 6% was related to the work injury. He found that the claimant could return to work with the restrictions placed on him at the functional capacity exam.

The claimant was examined by Dr. Koprivica on April 30, 2009. Dr. Koprivica found that the claimant's September 25, 2005 injury was the prevailing factor in causing the claimant's left shoulder, cervical and lumbar injuries. He found DISC herniation at L4-5 level of the lumbar spine and right sided C4-5 DISC herniation of the cervical spine.

Dr. Koprivica agreed with Dr. Robinson's restriction and added the additional restriction of avoiding frequent or constant bending at the waist, pushing, pulling or twisting, avoiding sustained or awkward rotation of the lumbar spine; no squatting, crawling, kneeling or climbing being allowed, frequent postural changes and an ad lib ability to change between sitting, standing and walking; sitting tolerance to less than 30 minute intervals with flexibility of getting up whenever necessary, standing and walking

intervals limited to less than 30 minutes with the ability to sit whenever necessary, and allowing to lie down during the day at unpredictable intervals.

Dr. Koprivica found that the claimant was permanently totally disabled.

Mary Titterington testified as a vocational expert for the employer. She said that Mr. Richardson's test results were very low. His low-test results limited him to unskilled or low level semi-skilled work. The number of jobs in the open labor market are significantly reduced as a result of his low academic and intellectual ability, but they do not totally preclude him from working under Dr. Munneke's evaluation.

She said if Dr. Koprivica's assessment is used, then the claimant would be unemployable.

Michael J. Dreiling testified as a vocational expert for the claimant. Mr. Dreiling found that when taking into account the totality of this individual's vocational profile and the ongoing medical care and treatment, along with the more current medical advice pertaining to his ability to function, along with the other vocational factors and his vocational profile, it is my opinion that he is essentially and realistically unemployable in the open labor market, cannot return to any of his past relevant work, and it is not reasonable to expect that any employer in the usual course of business seeking persons to perform duties of employment in the usual and customary way, would reasonably be expected to employ this individual in his existing physical condition.

Mr. Dreiling said "based upon all of the vocational factors for the individual, it is my vocational opinion that no employer in the usual course of business seeking persons to perform duties of employment in the usual customary way, would be reasonably be expected to employ this individual in his existing physical condition."

There was considerable evidence concerning the claimant's inability to read. He said he had taken special education classes in high school. He also lost several jobs because of his inability to read. He was unable to keep his job with the U.S. Army as a cook because he couldn't reduce recipes from a large number of persons to a smaller number. He also related an incident when he was discharged as a guard because he could not make a written report describing an incident that occurred at his employment. He also said that he could not read maps or road signs.

I did not consider the claimant's illiteracy. There was little evidence that the claimant's inability to read was caused by a functional disorder. There was no evidence that the claimant had taken adult reading classes or had made any attempt to improve his ability to read.

Mr. Richardson testified that he has both good and bad days. On his good days which are the majority of time, the claimant is able to function fairly well. He is able to exercise and mow his yard. He can drive and perform normal activities.

The problem is his bad days. He testified that he has 6 or 7 bad days out of 80 days. He never knows when the bad days will occur. When he has a bad day, he said he could not even drive 5 miles. He has such pain that he must lie down. He must take medicine that results in him being drowsy and unable to operate machinery.

I do not believe that the claimant would be able to compete for employment in the open labor market. The claimant does not know when his bad days will occur. There is no pattern to them and they occur randomly. No prospective employer would be willing to employ the claimant under those circumstances.

The claimant has herniated DISCs in both his cervical and lumbar spines. Herniated DISCs are a serious injury. Surgeons have in the past recommended that the claimant receive surgery to cure these herniated DISCs. Because of these herniated DISCs in two separate locations on his spine, I find the claimant's complaints of pain and his testimony of having bad days and being required to lay down as believable.

I find and believe from the evidence that as a result of claimant's accident on September 28, 2005, the claimant was rendered permanently totally disabled. I order and direct the employer to pay to the claimant the sum of \$696.97 per week commencing February 26, 2009 for the remainder of claimant's life.

The claimant will certainly require additional medical treatment to monitor his pain medications. The employer is directed to provided claimant with such future medical treatment as may be reasonable and necessary to cure and relieve the claimant from the condition caused by his injury on September 28, 2005.

The claimant is asking for unpaid medical expense but some of his expenses were for antibiotics and are clearly not related to this injury. Others are responsible to claimant. He is also asking for medical mileage expense that has not been documented. Claimant's request for past medical expense and past mileage expense are hereby denied.

Mr. Joseph K. Lewis is hereby assigned a lien in the amount of 25% of this Award for necessary legal services

Made by: /s/ Nelson G. Allen
Nelson G. Allen,
Chief Administrative Law Judge
Division of Workers' Compensation

This award is dated, attested to and transmitted to the parties this 3rd day of

August, 2011 by:

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation