



IN THE CIRCUIT COURT FOR SHELBY COUNTY, ALABAMA

CONNIE BAKER,

Plaintiff,

-vs-

CASE NO. CV 2010-901159

RELIABLE TRANSPORT, LLC,

Defendant.

ORDER AND FINAL JUDGMENT

This workers' compensation case was called to trial January 24, 2012. The parties were represented by counsel, and the Court received stipulations from the parties that are hereby adopted.

In summary, the parties stipulated to the jurisdiction of this Court and that they were employee and employer at all times pertinent, and properly subject to the workers' compensation laws of the State of Alabama.¹ The plaintiff suffered an injury to her back and body as the result of an accident arising out of, and the course and scope of, her employment with the defendant.

For the plaintiff's injuries, the defendant paid no compensation benefits, but it did pay 10 weeks of wages in lieu of compensation. The plaintiff's compensation rate is \$180.53, based on an average weekly wage of \$271.25.² The plaintiff has been at MMI since March 5, 2009.

¹Additionally, the defendant's corporate representative admitted under oath to the fact that, although the defendant had over 5 employees at all times material hereto, it was neither insured nor qualified to act as a self-insurer for its obligations under the Alabama Workers' Compensation Act.

²As is addressed below, however, this figure is due to be doubled as a matter of law.

The plaintiff makes two claims in her case, either that she is permanently and totally disabled, or that she is permanently partially disabled. The defendant argued that the plaintiff's claim should be denied, or that she is only permanently and partially disabled. The parties tried this case, and asked primarily that the Court determine the extent of the plaintiff's loss of ability to earn and the benefits due as a result thereof, and what obligations the defendant has regarding the provision of future medical care.

Inasmuch as the law requires of this Court written findings of fact and conclusions of law upon the trial of a workers' compensation case, the Court now sets about completing that task.

I. FINDINGS OF FACT

The plaintiff is an African-American female, 54 years old at present, born October 28, 1957. She dropped out of school, but subsequently returned and completed her high school diploma. She has no formal education beyond that. After working cleaning houses, the plaintiff has been employed as a driver for various businesses, primarily taking children or elderly people to various medical appointments. The defendant employed the plaintiff for over a year, having hired her to do the same work that plaintiff had done for over 5 years while employed by her most recent former employer; the defendant provides transportation for the elderly and disabled under contract with a company called Clas-Tran, and was awarded that contract to succeed plaintiff's immediate prior employer. In essence, plaintiff drove under the Clas-Tran contract, doing work for her prior employer

and this defendant uninterrupted for 6 years. Moreover, the plaintiff had been primarily employed as a bus driver for the disabled and elderly for the past 20 years. Ms. Pugh, corporate representative of the defendant at trial, testified that the plaintiff's work was exemplary, and that her reference check of the plaintiff before hiring showed that she had been an "impeccable" employee with her prior employer. Ms. Pugh likewise testified to the plaintiff's trustworthiness, her reliability as an employee, and her credibility.

Evidence developed by each party showed that the plaintiff was injured in an automobile wreck on December 17, 2008. Within a week of the wreck, the plaintiff visited her primary physician with complaints of low back pain. She then began conservative daily treatment with Dr. Thomas D. Weber at the Shelby Family Chiropractic Center. The plaintiff was referred to Dr. Marion Sovic who performed a series of fluoroscopic lumbar epidural blocks which provided no pain relief, and have since been discontinued. She was also referred to board certified neurologist, Dr. Thomas Francavilla, who reviewed an MRI of February 23, 2009, revealing an annular tear and bulge on the right side of the L4-5 level. Dr. Francavilla determined that the plaintiff would not benefit neurologically from surgical intervention and referred her back to Dr. Weber with additional instructions to treat her with anti-inflammatory and anti-spasmodic medication. Dr. Weber released her to light duty on March 5, 2009 with instructions for no lifting, excessive sitting, standing or walking. She is currently in pain management with her primary care physician Dr. Michael Turner.



The defendant was aware of the job accident and resultant injury, and consented to the plaintiff seeking and receiving treatment from the providers listed above.

The Court was presented with the testimony of Dr. Thomas Francavilla, who testified that the plaintiff's back injuries – to wit, an annular tear at the L4-5 level and resultant symptoms, related to the wreck “to a reasonable degree of medical certainty.” The Court notes that testimony to such a degree of certainty exceeds what is required by law in workers' compensation cases, as set in Harris v. Russell Petroleum Corp., 55 So.3d 1225, 1231 (Ala.Civ.App.2010) – which is merely a standard of more likely than not. Surgery is not an option, according to the evidence presented, and the plaintiff's pain is managed by prescription drug therapy, consisting of Lortab and Lyrica for pain, Flexeril and Soma as muscle relaxants, and Cymbalta for anxiety and depression. Plaintiff's care is managed by Dr. Michael Turner of Calera Family Health.

It serves to observe that there was no evidence presented that the plaintiff suffered any pre-existing back pain, back injury, or back treatment.

Plaintiff gave a detailed description of the manual tasks required by her work for the defendant, which included not only driving, but also pushing patients in wheelchairs, loading and unloading wheelchairs from the transport van, and assisting them into and out of medical appointments.

The plaintiff has had conservative treatment from Dr. Thomas Weber, a chiropractor whose records were presented to the Court; invasive treatment in the



form of various injections for her pain and symptoms to try and repair the annular tear; and prescription medication treatment from her present physician. All have failed to alleviate her pain.

Before cataloging the evidence on the issue of the plaintiff's pain and symptoms, and their effect on her life, this Court is duty-bound to comment on her credibility -- which the Court finds to be unblemished. As a matter of common sense, this Court observes that a person with a credibility problem would likely not have been able to remain so many years in the same field of work, and so many years doing work under the Clas-Tran contracts. Moreover, there is not a single mention in any of the medical records of any embellishing or symptom-magnification in which the plaintiff could be thought to have engaged. Finally, the Court heard and saw the plaintiff testify, and was impressed with both her candor and honesty during direct examination, and perhaps more importantly, during thorough cross-examination.

The Court also pauses to note that the findings of fact relating to the extent of the plaintiff's disability and impairment, as set forth herein, are based as much on anything else as the Court's sensory perceptions during trial. The Court had the opportunity to watch the plaintiff, her mannerisms, her demeanor; the Court also had the opportunity to hear the cadence of her speech, and the tone and inflection and pitch of her voice. As such, this Court had the ability to gain a sense of the plaintiff's cognitive processes and communicative abilities that a dry transcript is incapable of demonstrating. The opportunity to see and to hear the



plaintiff live and in person served to reinforce the Court's finding that the plaintiff's credibility is unblemished, and the forthcoming conclusions regarding the injuries made the basis of her claims.

The plaintiff's testimony concerning her pain was compelling. The Court finds that, as a result of the back injuries, the plaintiff endures constant and severe pain that affects her adversely in the simplest activities of life and in the basic function of contemporary adult humans. By way of illustration, the plaintiff testified that the simplest of household tasks exacerbate pain that already is constant, as does sitting and walking, as does any activity about which she was asked or about which was tested. Not only does the plaintiff endure times where her sleep is interrupted, the pain is such that her entire sleep patterns are disrupted. Indeed, the plaintiff testified that her pain, and the side effects from the medication she is prescribed therefor, impair her ability to focus and concentrate – a fact that certainly is important on the issue of her relative employability. It is readily apparent that the back injury and the chronic and disruptive pain have persisted.

The plaintiff testified credibly regarding how her pain affects her, and that it impairs her abilities in the following respects: lifting, carrying, crawling, climbing, crouching, and kneeling. Accepting those observations as fact leads to the ineluctable conclusions that basic activities of human life exacerbate pain that already is constant, and that the simplest tasks commonly associated with employment would likewise cause exacerbation.

The foregoing findings of fact are those selected by the Court for inclusion in this Order, and summarize evidence bearing on the issues tried. The Court should not be understood to intend that the facts set forth herein are all of the facts bearing on the issues presented; rather, the Court intends that the recitation be sufficient to permit the reader a framework for understanding the just resolution of the issues submitted for trial.

Based upon the foregoing, the Court now turns to its conclusions of law.

II. CONCLUSIONS OF LAW

A. Is the Plaintiff entitled to compensation benefits and medical benefits under the Alabama Workers' Compensation Act for her back injuries? Yes.

As to compensation benefits, those are discussed in more detail below. As to medical benefits, **the defendant is ordered to provide and pay for reasonable and necessary medical treatment for the plaintiff's back injuries in accordance with Alabama Code §25-5-77 until further order of this Court or during the plaintiff's life.** Given that the plaintiff has never been expressly authorized medical care, the Court hereby designates Dr. Michael Turner as the authorized treating physician. Moreover, any charges for medical treatment incurred by the plaintiff for treatment by Dr. Thomas Weber, Dr. Sovic, Dr.



Francavilla, or Dr. Turner, for injuries related to the subject accident, are hereby ordered to be reimbursed to the plaintiff by the defendant.

B. Is plaintiff permanently partially disabled? Yes.

While “permanent total disability” is not synonymous with utter helplessness, and is not a finding reserved for the bed-bound or home-bound or most grotesquely injured of all, it does require evidence of “the inability to perform one’s trade and the inability to find gainful employment.” James River Corp. v. Franklin, 840 So.2d 164, 168 (Ala.Civ.App. 2002) (citations omitted). “Gainful employment” is “employment similar in remuneration to that earned prior to the injury,” and must be “suitable” – “compatible with the employee’s pre-injury occupation, age, education, and aptitude.” Brock v. Blevins, Inc., 775 So.2d 824, 829 (Ala.Civ.App.1999)(citations and additional internal quotation marks omitted).

On the facts presented, the Court finds that the plaintiff has not met the high requirements of the test warranting a finding of permanent total disability. The plaintiff’s testimony regarding the duration, severity, extent, and worsening of her pain, the effects that pain has on her daily activities, the side effects of the prescribed medications she is compelled to take, the side effects of that medication, and the effects of that pain and the medication prescribed to assist her coping with it on her sleep and focus and concentration were compelling, but do

not persuade this Court, in the context of all the evidence, that plaintiff is permanently and totally disabled.

Evidence was presented that the plaintiff has received an award by the Social Security Administration finding her permanently and totally disabled from gainful employment, and that her back pain was part of the underpinning for that decision; testimony elicited by the defense at the trial of this matter, however, showed that there were other factors considered by the Social Security Administration in its finding that the plaintiff was disabled from gainful employment. Moreover, there was evidence, albeit duly impeached by cross-examination from plaintiff's counsel, that the defendant offered plaintiff work that appears to fit within the restrictions last imposed by the treating chiropractor.

As such, and without minimizing the severity of the plaintiff's injuries or their permanent effect upon her, the Court finds that plaintiff has suffered a vocational disability of 85%.

C. What compensation benefits are due plaintiff? The Court finds, based upon the stipulations of the parties, that the plaintiff's permanent partial disability began on March 5, 2009 — the date she was placed at maximum medical improvement.

Her compensation rate *would* be \$180.53 per week, if the defendant were insured or otherwise qualified as a self-insurer; this defendant, however, is neither. As such, the compensation rate must be doubled, on the authority of Alabama

Code §25-5-8(c), and the unanimous ruling of the Supreme Court of Alabama in In Re Ruggs, 10 So.3d 7, 11 (Ala.2008).³ ***As such, the compensation rate for purposes of the disposition of this matter is \$361.06.***

Following her accident, she was paid \$2,712.50 in lieu of compensation, for which the defendant is due credit. From the date of the accident through the date of MMI, there were 10 weeks, when, which multiplied by the plaintiff's compensation rate of \$361.06, equals \$3,610.06. Subtracting the amount due to be credited to the defendant, this yields \$897.56 in TTD benefits which have accrued.

From the date of MMI until present, there have been approximately 187 weeks. Multiplied by 85% of her compensation rate of \$361.06, to obtain the plaintiff's PPD rate, this yields \$57,390.49 in accrued PPD benefits.

When the accrued TTD and the accrued PPD benefits are added, the sum total is \$58,288.05; from that sum, counsel for the plaintiff is entitled to deduct 15% as an attorneys' fee, plus reimbursement for expenses reasonably incurred in the prosecution of this action. **The defendant is ordered to pay the sum of \$58,288.05 at once** jointly to counsel for the plaintiff and the plaintiff to satisfy the amount accrued and due.

Plaintiff is entitled, in the future, to weekly PPD benefits of \$306.90 for that period of time representing the result obtained by subtracting from 300 weeks the sum total of weeks of TTD paid (10) plus the number of weeks accrued of PPD

³There, the Supreme Court of Alabama made clear that doubling the compensation rate in accordance with the statutory dictate is mandatory, and that this Court has no discretion to avoid the imposition of that penalty.



ordered paid (187). As such, 300 weeks minus 197 weeks equals 103 weeks. The defendant is also ordered to pay to the plaintiff the PPD rate of \$260.87 per week for the next 103 weeks (until a total of 300 weeks of TTD plus PPD has been paid), that figure representing the PPD rate of \$306.90 less 15% (in recognition of the fee to be awarded to counsel for the plaintiff).¹

Using a six percent discount rate, the Court finds that the present value of the number of future weeks for which Ms. Baker is entitled to receive benefits is 97.0817 weeks. Multiplied by her PPD rate of \$306.90, the present value of the future stream of benefits due pursuant to the Court's finding of permanent partial disability is \$29,794.37. On the authority of *Ex parte St. Regis Corp.*, 535 So.2d 160 (Ala.1988), plaintiff's counsel is awarded an attorneys' fee of 15% of the present value of the future stream of permanent partial disability benefits, or \$4,469.15. **The defendant is ordered to pay \$4,469.15 at once to counsel for the plaintiff.**

Costs of court are taxed to the defendant. Plaintiff is given 30 days from the date of this Order to submit any motions to tax special costs that she deems appropriate to request being taxed. This Order is intended to be final and appealable, there being no just reason for delay. Jurisdiction is retained solely to enforce this Order as may be necessary.

¹ Whereas PPD would ordinarily be capped at \$220 per week, pursuant to Alabama Code §25-5-68(a), the penalty for uninsured employers set forth in §25-5-8(e) mandates the employer pay "two times the amount of compensation which would have otherwise been payable." Effectively, here, the "cap" is \$440 per week, and what the court finds to be due to the plaintiff is well beneath that.

Done and ordered this 2nd day of Oct, 2012.


[Signature]
Circuit Court Judge

Certified a true and correct copy

Date: 06-07-13

Mary H. Harris *phs*

Mary H. Harris, Circuit Clerk
Shelby County, Alabama


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