

COMMONWEALTH OF KENTUCKY
OFFICE OF WORKERS' CLAIMS
CLAIM NO. 2005-65882
BEFORE JOSEPH W. JUSTICE, ALJ

JAMES G. LAND

PLAINTIFF

OPINION, AWARD AND ORDER

FRITO LAY, INC.

DEFENDANT

INTRODUCTION

Plaintiff filed his claim for a work related injury resulting from an auto accident on November 23, 2005. He had several pre-injury operations on his spine as well as a hip replacement. He had two subsequent lumbar operations. The two impairment rating physicians are identical in their impairment rating of the low back but have different ratings for exclusion of a pre-existing active condition.

STIPULATIONS

The parties jointly stipulated and agreed that there was coverage under the Act and that an employment relationship existed between the Plaintiff and Defendant/employer at all times herein relevant. Plaintiff sustained a work related injury on November 23, 2005. Defendant/employer had due and timely notice of Plaintiff's injury. Temporary total disability benefits were paid at the rate of \$607.23 per week from the date of injury through October 26, 2007, and through December 22, 2005. After that date Plaintiff was paid \$483.65 per week. The defendant/employer has paid on behalf of Plaintiff, medical expenses in the amount of \$94,633.94. Plaintiffs' average weekly wage

was \$783.39. Plaintiff reached maximum medical improvement on October 17, 2007. Plaintiff's date of birth is May 30, 1958. The plaintiff's educational level is twelfth grade and he has no specialized or vocational training.

CONTESTED ISSUES

1. **Pre-existing active condition.**
2. **Extent and duration.**
3. **Causation/work relatedness.**
4. **Multipliers.**

SUMMARY OF EVIDENCE

1. **Testimony of the Plaintiff, James G. Land.** Mr. Land is 49 years of age and had worked for defendant/employer from August, 2001 to the time of the injury. Prior to his Frito Lay employment he worked as an assistant manager for a convenience food market, did some route sales for a beverage distributor, worked in a steel factory as a "saw cutter" and did light manufacturing work for Lexmark.

Mr. Land worked as a route sales driver for Frito Lay and his job duties in that employment was delivering stacked products to small grocery and convenience stores in and around Central Kentucky. At the beginning of his shift he would process and load the products and inventory that he would need that day and then drive to the various stores where he would restock the merchandise for sale in the stores, remove the

merchandise that should be removed, and, at the end of the day account for his deliveries and returns. At these tasks he was required to lift products rarely exceeding 20 pounds but he would have to bend and lift those objects as well as twisting and placing them on the shelving.

On November 23, 2005, while he was in route to another place of business, his vehicle was struck in the rear by another vehicle. He was taken immediately to a local medical facility. Six days following the accident he saw Dr. Harry Lockstadt, an orthopedic physician at Bluegrass Orthopedics. He was operated on by Dr. Lockstadt on January 7, 2006. Sometime after this operation he started to have pain radiating down from the knee into the foot and had unbearable pain from his lower back radiating down his legs. He did not improve and underwent a second post injury surgery on October 10, 2006, by Dr. Lockstadt, at which time Dr. Lockstadt performed a three level lumbar fusion that included insertion of an interbody fusion with a VMP bone interbody spacer with cage.

Following that surgery Plaintiff states that he began suffering from loss of sensation and control in both hands. He testified that his right hand was much improved but he was still having difficulty with his left hand with numbness and tingling into his fourth and fifth digit in addition to the mediolateral forearm and the elbow. At the hearing these conditions had improved but were not where he thought the conditions should be. He had lost of strength in the fingers, motor skills, picking up stuff off the table and lacking strength to hold the strings down while playing a guitar.

On cross examination, Plaintiff reviewed some of the surgeries he had had going back to 1982, when he had his first back surgery by Dr. Tutt. He had neck cervical

fusion surgery at the C5-C6 level. He was later seen on May 20, 2004, for an evaluation of his low back. Dr. Lockstadt operated on him on June 29, 2004 for laminectomy and discectomy on left side at L3/4 and L4/5. He said he was back to work after four months following this surgery. He continued to see Dr. Lockstadt regularly for injections following the 2004 surgery. He saw him on November 1, 2005, in the same month prior to the MVA.

In contrasting his condition now as prior to his surgery in 2004, Plaintiff stated that before 2004 he bowled, refereed ballgames and was in good condition with some pain. He stated that now he is not able to bowl anymore and in September, 2005, prior to the MVA, he had to quit refereeing basketball which he had done previously, calling about 160 games per year. He claimed the he quit in September not because he was unable to do it but because he wanted to spend more time with his daughter.

2. Lexington Clinic/Bluegrass Orthopedics. Plaintiff filed approximately 200 pages of reports and treatment notes from Lexington Clinic, Bluegrass Orthopedics and various other places. The earliest report was an MRI dated March 2, 2001, performed by Dr. Ellis on the request of Dr. W. Clark Bailey. It showed previous back surgery, recent worsening pain, particularly after lifting. Findings showed protrusion at the L3-4 level, centrally and of the subligamentous variety with resulting moderately severe central stenosis. Post surgical changes were visible at the L5-S1 level with minor scar enhancement but without evidence of recurrent disc protrusion at L5-S1. The L4-5 shows moderately severe central stenosis but without disc protrusion. The impression was broad central disc protrusion at L3-4, moderately severe central stenosis at L4-5, but

without disc protrusion. Post surgical scar enhancement, without significant stenosis or significant stenosis or disc protrusion at L5-S1.

There is another report dated June 12, 2003, showing an MRI of the cervical spine. This was in connection with the cervical disc problem and ultimately fusion of the disc at C6-7. There was also an MRI done of the right shoulder at that time showing some degenerative calcus hypertrophy of the AC joint with light defacement of the superior aspect of the supraspinatus tendon complex muscle.

On February 16, 2004, there was an MRI of the spine without contrast and complaints were low back pain and left leg pain. Impression was multi level spinal stenosis, but without interval change when compared to March 13, 2001. There is no evidence of disc protrusion. On March 16, 2004, there was another exam of the lumbar spine with complaints of low back pain. Impression at that time was degenerative changes, including disc space narrowing at L5-S1. There was also study done of both hands for left hand pain and the impression there was minor abulsion fracture at the third mp joint of unknown duration.

Dr. Harry Lockstadt performed an exam on May 20, 2004. He took a history of hip replacement by Dr. Burke. Plaintiff was having quite a bit of problems through the lower back with some numbness into the legs mostly posteriorly as well. He continued to work but his symptoms continued to worsen and are aggravating for him. His review of the MRI showed disc deteriorating at L2-3, L3-4, L4-5 and L5-1 levels. He had small bulging at all of these levels and findings of stenosis at multiple levels. He had instability at the L5-S1 level with retrolisthesis. His recommendation at that time was to do epidural steroid injections to calm down the irritation of the nerve roots and the disc. Beyond that

the only option would be endoscopic discectomy. Dr. Lockstadt noted at that time Plaintiff was currently working and still doing some refereeing at basketball games. Plaintiff voiced a desire to continue to referee and therefore no indications of surgery currently.

A myelogram was performed at St. Joseph East on June 4, 2004, and impression was high grade spinal stenosis from L3-4 to L5-1, lesser graded spinal stenosis at the L2-3 level. This was related to concentric disc bulges as well as facet and ligamentum flavum hypertrophy.

There was a follow up post operative visit to Bluegrass Orthopedics on August 23, 2004, which was six weeks post foraminotomy L3-4, right sided laminectomy, foraminotomy and discectomy at L4-5.

Plaintiff apparently was followed by Dr. Lockstadt from the prior surgery and on October 28, 2004, presented for follow up on lower back. He had developed lower back pain but had tried to deal with it mostly and the pain had gotten progressively worse. X-rays at that time showed multiple level disc degeneration and slight instability at the L5-S1 level and facet joint arthrosis. His recommendations was to set him up for epidural injections to see if this would help settled down some of his pain. He was going to give him Ultram and Celebrex and place him on physical therapy if this had not been done before as Plaintiff had been fairly active and knew the exercises. He continued to see him monthly for epidural injections and after several months he was then placed on maintenance level for injections.

Plaintiff continued under the care of Bluegrass Orthopedics during the year 2006 and on March 21, 2006, there is an evaluation at which time he received another single

shot injection. He continued regular visits and on May 30, 2006, he had an MRI. Thereafter surgery was preformed by Dr. Lockstadt on October 10, 2006. He had fusion of the L3-4, L4-5, and L5-S1.

3. **Dr. Harry Lockstadt.** Dr. Lockstadt completed a Form 107 as well as testifying by deposition. He assessed an impairment rating of 27%, 13% of which would be for the combined low back problems prior to the MVA. Dr. Lockstadt conceded on cross examination that on a bad day, Plaintiff's impairment under the Guides could range between 13% and 26% prior to the MVA. He testified Plaintiff had problems with lumbar spine for a number of years.

Even after the MVA and the condition at the time Dr. Lockstadt testified, he would encourage Plaintiff to return to employment. Dr. Lockstadt stated that Plaintiff should have been working on restrictions prior to the MVA, but the additional restrictions at the present time would be less bending through the spine and limited more to sitting and standing. His lifting would be the same, which was occasionally lifting 35 pounds, and on a repetitive basis 10 pounds. Dr. Lockstadt testified the problem with doing his present job would be bending over to stock shelves at lower levels and at higher levels. Dr. Lockstadt testified that ideally Plaintiff should have avoided the Frito Lay job both before the MVA and afterwards.

4. **Dr. Daniel Primm.** Dr. Primm did two IME's on Plaintiff, one on August 16, 2006 and the other on January 31, 2008. Dr. Primm took a history of Plaintiff, past medical history, surgical history, medical records review, and reviewed his current medications. He performed a physical examination at which time he found the various problems that Plaintiff presented with. He had x-rays done of the lumbar spine that day

which showed fairly advanced disc space narrowing at L4-5 and L5-S1 and lesser narrowing noted at L3-4. He reviewed copies of MRI dated December 6, 2005 as well as one dated May 30, 2006.

His impression was chronic multilevel degenerative disc disease and degenerative arthritis, lumbar spine; status post lumbar laminectomy and discectomies times three; and persistent low back pain secondary to chronic diffuse degenerative arthritis and degenerative disc disease. In his discussion Dr. Primm advised against radical surgery as fusion of Plaintiff's spine from L2-L5 in this man in his age group. He did not think fusion stood a great chance of relieving his symptoms significantly nor allowing further improvement over light duty status as Dr. Lockstadt was then currently recommending.

At the January 31, 2008 examination he basically did the same type of examination as he had done previously. His impression was chronic multilevel degenerative disc disease and degenerative arthritis, lumbar spine; status post lumbar laminectomy and discectomies times three; and status post multi-level lumbar discectomy with good clinical result. He felt Plaintiff had reached maximum medical improvement at that time. His impression was that Plaintiff would probably return to a more sedentary level of labor. He felt that he could lift 10 to 15 pounds frequently as well as up to 20-25 pounds on an occasional basis but should avoid any significant or regular stooping or bending at the waist.

He assessed an impairment rating of 27% to the body as a whole from the low back. He said 75% should be considered a pre-existing active impairment. He said the balance should be on the basis of an aggravation or arousal of those chronic, well established degenerative changes.

5. **Ralph C. Haas, Ed.D., Vocational Counselor.** Mr. Haas evaluated Plaintiff on March 1, 2008, via standard vocational evaluation, in order to assess Plaintiff' occupational access to his local labor market subsequent to a reported workplace injury of November 23, 2005. Mr. Haas noted he also reviewed various medical records. Plaintiff was given the Wide Range Achievement Test to assess his current academic level of achievement and potential for further employment and/or training. Mr. Haas opined Plaintiff has lost access to the Medium exertional category of, and, as such, to the Driver/Delivery aspect of the role he performed for defendant/employer at the time of the injury. Conversely, he noted both physicians opine that he retains the physical capacity to work in many sedentary and light physical demand level jobs. With Plaintiff's work experience in such functions as Direct (commission based) Sales, Sales Clerk, Retail Clerk, Store Management/Assistant Management, Customer Service, etc., and his current academic functioning, Mr. Haas opined Plaintiff retains the capacity to find and perform work in these same vocational niches in his local job market, including some of his past cashiering, customer service and retail sales jobs.

ANALYSIS, FINDINGS OF FACT AND
CONCLUSIONS OF LAW

1. **Extent of Claimant's Compensable Disability.** It can hardly be disputed that Plaintiff had an active disability at the time of his MVA on November 25, 2005. That he continued to work at a job that did not require a lot of lifting, but a lot of bending, is a credit to him. To understand how he continued to referee basketball games three nights per week up until September 2005 is to understand how he continued to work at his job.

These things he continued to do with an artificial hip, fused cervical vertebra, and at least three low back operations. His impairment rating on his hip would be 15%; and the cervical fusion would be 25 %.

These are the conditions that Plaintiff had at the time of the MVA. He had his first back operation in 1982, performed by Dr. Tutt. He had cervical fusion at C5-6 in 2003, also performed by Dr. Tutt. In July or August, 2004, he had right sided laminectomy, foraminotomy at L3-4, and right sided laminectomy, foraminotomy and discectomy at L4-5, performed by Dr. Lockstadt. Following the MVA, he underwent left sided discectomy, laminectomy and foraminotomy at L3-4 by Dr. Lockstadt. He did not do well after this operation and on October 10, 2006, he returned to Dr. Lockstadt and underwent L2-3 internal fixation with x-stop, L3-4 repeat decompression, discectomy, sequestrectomy, neurolysis, radical discectomy, and interbody fusion with a BMP bone interbody spacer with cage, L4-5 repeat surgery, with the same procedure as above. He had L5-S1 posterior fusion, and fusion at L3-4, L4-5, and L5-S1. In addition to all of the above, he may have had an earlier additional operation at L5-S1. A Lexington Clinic Radiological report dated March 2, 2001, talks about "past surgical changes visible at L5-S1 level with minor scar enhancement.

Even with all of the above, he was encouraged to return to employment by Drs. Lockstadt and Primm. Dr. Lockstadt would place restrictions of less bending than his last job at Frito Lay, and occasionally lifting no more than 35 pounds. Dr. Primm felt that Plaintiff probably should return to a more sedentary level of labor, but said he could lift 10 to 15 pounds frequently, as well as up to 20 to 25 pounds on an occasional basis, but he should avoid any significant or regular stooping or bending at the waist.

Dr. Primm assigned an impairment rating of 27% for his low back, with 75% of that pre-existing active impairment.

Dr. Lockstadt assigned an impairment rating of 27%, with 13% preexisting for the L4-5 level, and the repeat of procedure at L3-4 that he had done in 2004. He conceded on cross-examination, that on a good day or bad day for Plaintiff, his pre-existing impairment could range between 13 and 26 percent. (Tr. Pp. 32-33).

Plaintiff argues that he did not suffer from any pre-existing active disability. He cites his employment and basketball refereeing as evidence of that fact. One only has to review the medical records that he filed herein to become fully aware that at the time of the MVA he had an active and serious back condition. Starting at Page 1, the sequentially numbered pages of reports in the record sets the picture. On March 2, 2001, there is an MRI report stating previous back surgery, recurrent worsening pain, and following with a litany of conditions of the back. Then again on June 12, 2003, another MRI of the cervical spine and the right shoulder, leading to the cervical fusion. Again, on February 16, 2004, MRI, low back and left leg pain, culminating in the 2004 surgery. On Page 26, a report dated October 28, 2004, and following, states there are continual visits to the doctor with complaints of pain, for which he was treated mainly with epidural injections. This continued up until November 1, 2005, just several days before the MVA.

In Wells v. Bunch, Ky. 692 S.W.2d 806 (1985), the Court noted that prior active occupational disability is determined to be the amount of occupational disability a claimant is suffering immediately before his subject injury. Since 1996, occupational disability is determined by utilizing impairment under the A.M.A. Guidelines. Therefore, it seems clear that the question is, what, if any, active impairment under the A.M.A.

Guidelines the plaintiff was suffering immediately prior to his injury of November 23, 2005?

The ALJ is more persuaded by Dr. Lockstadt's impairment rating of 13 % for the prior active low back condition. Dr. Primm's assessment of 70% may have been more accurate if Plaintiff's operation had ended with the January 17, 2006 repeat operation at the L3-4 level, but for whatever reason, he was operated again on October 10, 2006, when he underwent spinal fusion at three levels. The ALJ finds that Plaintiff has a 27% whole person impairment of the low back, of which 13% was attributable to a pre-existing active impairment of the low back.

The next question the ALJ must determine is how this 14% impairment has affected the Plaintiff's ability to work. Plaintiff argues that he is permanently and totally disabled as a result of the work-related injury. Permanent total disability is defined in KRS 342.0011(11)(c) as the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. Hill v. Sextet Mining Corporation, 65 SW3d 503 (KY 2001.)

"Work" is defined in KRS 342.0011(34) as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. The statutory definition does not require that a worker be rendered homebound by his injury, but does mandate consideration of whether he will be able to work reliably and whether his physical restrictions will interfere with his vocational capabilities. Ira A. Watson Department Store v. Hamilton, 34 SW3d 48 (KY 2000.) In determining whether a worker is totally disabled, an Administrative Law Judge must consider several factors

including the worker's age, education level, vocational skills, medical restrictions, and the likelihood that he can resume some type of "work" under normal employment conditions. Ira A. Watson Department Store v. Hamilton, supra.

Both examining physicians testified Plaintiff would have trouble in areas of his former job. He would have trouble bending as much as was required in that job. Both said he could return to a job like the one he had, but with a little less bending. Plaintiff has demonstrated that he can adapt and perform as the last several years of his life has shown. He demonstrated skills in his employment that are easily transferable to jobs a little less sedentary than the Frito Lay job. Someone as industrious and dedicated as he should be able to find suitable employment matching his capacity to work. He obviously has a good mental attitude, as he postponed surgery so that he could referee ball games.

The ALJ is not convinced that Plaintiff has a complete and permanent inability to perform any work. He finds that Plaintiff does not retain the capacity to perform the job he was doing immediately prior to the injury.

The parties stipulated MMI was reached on October 17, 2007. There was civil litigation in Circuit Court over the motor vehicle accident. The parties informed the Administrative Law Judge that \$100,000.00 in settlement had been paid into Court; and that the parties would let the Circuit Judge determine the amount of subrogation and division of those proceeds.

AWARD & ORDER

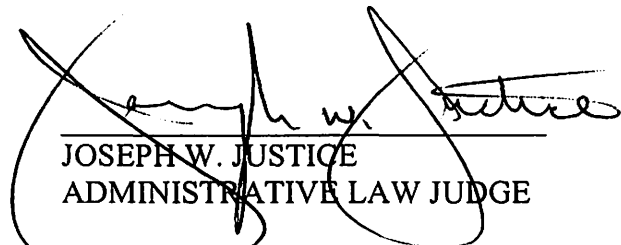
Based upon the foregoing findings of fact and conclusions of law, **IT IS HEREBY ORDERED AND ADJUDGED**

1. The Plaintiff, James Land, shall recover from the Defendant, Frito Lay, Inc., and/or its insurance carrier temporary total disability benefits in the sum of \$522.26 per week from November 24, 2005 through October 17, 2007, and thereafter the sum of \$191.28 per week for 14% permanent partial disability commencing on October 18, 2007 and continuing for a period not to exceed 425 weeks together with interest at the rate of 12% per annum on all due and unpaid installments of such compensation. The Defendant shall take credit for any payment of such compensation heretofore made, including those payments of temporary total disability benefits already made. All benefits shall terminate pursuant to KRS 342.730(4) as of the date on which Plaintiff qualifies for normal old-age Social Security retirement benefits.

2. Plaintiff shall recover of Defendant and/or its insurance carrier, such medical expenses including but not limited to provider's fees, hospital treatment, surgical care, nursing, supplies, and appliances as may be reasonably required for the care and relief from the effects of the work-related injury. Defendant's obligation shall be commensurate with the limits set by the Kentucky Medical Fee Schedule.

3. All motions for approval of attorney's fees shall be filed thirty (30) days after the final disposition of this award. Any such motions must include an itemization of services together with either the actual times or reasonably accurate estimate of the times expended on each of the itemized services listed.

Rendered and copies deposited in the U.S. Mail addressed to the parties listed above on this the 24th day of November, 2008.



JOSEPH W. JUSTICE
ADMINISTRATIVE LAW JUDGE

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