

---

IN THE NEBRASKA WORKERS' COMPENSATION COURT

ISAAC ORTIZ, ) DOC: 201 NO: 2525 ) Plaintiff, )  
) vs. ) AWARD ) CEMENT PRODUCTS, INC., )  
) Defendant. )

APPEARANCES:

---

IN THE NEBRASKA WORKERS' COMPENSATION COURT

ISAAC ORTIZ, ) DOC: 201 NO: 2525 ) Plaintiff, )  
) vs. ) AWARD ) CEMENT PRODUCTS, INC., )  
) Defendant. )

APPEARANCES:

Plaintiff: Todd D. Bennett  
Rehm Bennett & Moore, P. C.  
3701 Union Drive #200  
P. O. Box 22067  
Lincoln, NE 68516

This matter came on for trial on July 13, 2004.

After trial plaintiff submitted Exhibit 51 which was received into evidence.

On July 11, 2001, plaintiff was employed by defendant as a laborer. On said date plaintiff was working on a concrete crew. His job was to see that concrete was put in a big pot which was then raised up by a crane and moved to the location where the concrete was to be poured. On July 11, 2001, the pot was full, and as the pot was being raised up it fell off the hook and struck plaintiff in the head; left arm; and left knee to his foot.

Plaintiff was taken by ambulance to the Great Plains Regional Medical Center where the emergency room notes show a history as follows:

A cement bucket that was on a loader fell, glanced off his head, and landed on his left leg causing a compound fracture of his tibia. It is comminuted and he has an open wound. He has not eaten since yesterday. He is good health. He does not speak English at all (E9, pp. 2 - 5).

Plaintiff came under the care of Dr. Mark McKenzie, an orthopaedic surgeon. Dr. McKenzie's admitting diagnosis was a grade III, open comminuted tibiofibular fracture to his left leg. This was a midshaft fracture which required external fixator application and fasciotomies. Plaintiff was admitted; underwent surgeries; and was discharged from the hospital on July 19, 2001 (E9, p. 18). It should be noted that in the surgery Dr. McKenzie examined plaintiff's left knee and found an injury to the posterior cruciate ligament and anterior cruciate ligament (E9, p. 8).

On November 14, 2001, Dr. McKenzie removed the external fixator and applied a short leg cast. On December 13, 2001, Dr. McKenzie recommended that plaintiff start weight bearing. On February 8, 2002, the cast was removed and plaintiff was placed in a cam walker. On April 17, 2002, Dr. McKenzie allowed plaintiff to work four hours per day, no climbing or lifting greater than 25 pounds. Defendant had no job available for plaintiff. Plaintiff did not return to work.

On July 16, 2002, plaintiff attended a functional capacity evaluation at Good Samaritan Health Systems (E10). The recommendations of the functional capacity evaluation were that plaintiff should seek full-time employment within the medium work level. This is noted to be lifting 50 pounds occasionally, 25 pounds frequently, and 10 pounds constantly. Mobility tasks to include walking, static and dynamic standing, squatting, and kneeling should be limited to the occasional work level category. The plaintiff would benefit from being allowed to alternate sitting and standing at least every two hours for pain management reasons. Plaintiff should continue to utilize JOVST compression stockings to control edema and continue his home exercise program.

On July 18, 2002, (E9, p. 10) Dr. McKenzie found plaintiff has a 5 percent left lower extremity impairment, and he should follow the recommendation of the functional capacity evaluation in terms of his future work. It was noted that plaintiff a very very slight limp.

On November 20, 2002, plaintiff returned to Dr. McKenzie with complaints of pain around the front of the left knee and also that the knee goes out on him intermittently. An injury to the left knee had been noted on July 11, 2001. The injury to the anterior cruciate ligament was causing some problems. Plaintiff was referred to physical

therapy and rehab. Dr. McKenzie noted plaintiff may at some point need ACL reconstruction. Plaintiff was fitted with a don joy derotational brace.

Plaintiff was examined by Dr. McKenzie on December 20, 2002, and on December 26, 2002 (E8, p. 13). Dr. McKenzie wrote that plaintiff could be actively working as tolerated. Plaintiff was to minimize kneeling, squatting, or pivoting on the left lower extremity. Plaintiff could lift up to 50 pounds.

On April 2, 2003, Dr. McKenzie examined plaintiff and wrote that plaintiff has instability of his left knee secondary to mild ACL insufficiency. Plaintiff has a 7 percent lower extremity disability (impairment) due to this left knee instability. Dr. McKenzie also wrote:

Should be noted that it is possible that with time, he could develop further instability symptoms potentially and if this is the case, he might require eventually an ACL reconstruction and this was discussed with him through his interpreter (E8, p. 14).

On April 30, 2003, Dr. McKenzie wrote that plaintiff has a 5 percent impairment due to superficial peroneal nerve and deep peroneal nerve injury that was suffered as a result of an open injury to the left tibia and an additional 7 percent due to ACL insufficiency. The combined values chart in the Evaluation of Permanent Impairments, 4th edition entitles plaintiff to a 12 percent disability involving his left lower extremity.

Also in the letter of April 30, 2003, Dr. McKenzie wrote that plaintiff's back problems were never brought to his attention and his notes show no evidence of any history of back problems. The comment about a back injury was in response to a report prepared March 11, 2003, by Dr. David W. Lauer (E11). Dr. Lauer had examined plaintiff for purposes of an impairment rating. Plaintiff complained of constant pain in his left knee and calf. The pain was increased with activities such as prolonged standing or walking up stairs. Dr. Lauer found plaintiff has moderate collateral and cruciate ligament laxity on the left which entitles him to a 10 percent whole person impairment. Using Exhibit 51 a 10 percent whole person impairment constitutes a 24 percent impairment of the left lower extremity. Plaintiff also has a 5 percent whole person impairment from the peripheral nerve damage, peroneal nerve of 5 percent. According to Exhibit 51 this would equal a 12 percent impairment of the left lower extremity. Plaintiff also has a 7 percent whole person impairment from the lumbar spine. The lumbar spine impairment is rated due to loss of motion.

On August 6, 2003, plaintiff was examined by Dr. Michael Morrison, an orthopedic surgeon. Dr. Morrison examined plaintiff and it was his impression:

1. Status post open comminuted fracture distal third left tibia and fibula requiring irrigation and debridement with external fixation device application.
2. Status post fasciotomies left lower leg.
3. Probable anterior cruciate ligament insufficiency left knee.
4. Leg length discrepancy, left longer than right, causing lumbar strain.
5. Possible peripheral nerve injury left lower leg.

Dr. Morrison recommended a heel/sole lift in his right shoe to compensate for his leg length discrepancy on the left which is probably contributing to some lumbar strain. Dr. Morrison recommended an MRI of the left knee and EMG and nerve conduction studies of his left leg.

On October 24, 2003, plaintiff had an MRI at Good Samaritan Hospital. The impression of the radiologist was "tear of the anterior cruciate ligament" (E16, p. 1).

On October 24, 2003, plaintiff was examined by Dr. W. M. Suleiman, a specialist in physical medicine and rehabilitation (E15). Dr. Suleiman performed an EMG and noted findings were suggestive of:

Lumbar radiculopathy, mild, at bilateral L4-L5, left side more affected.

2. Left common peroneal nerve is showing slight delay in distal latency, which is most probably secondary to traumatic scarring tissue, which is expected to improve in time.

Also on October 24, 2003, plaintiff was examined by Dr. Patrick Moore, D. P. M. Dr. Moore treated a leg length discrepancy. Plaintiff was fitted for a polypropylene device with a one-quarter inch heel lift to the right. On January 6, 2004, plaintiff returned to Dr. Moore. The plaintiff was wearing the heel lift most of the time. The plaintiff noticed a little difference in his back discomfort.

On January 7, 2004, plaintiff saw Dr. McKenzie for a recheck. Plaintiff's left knee was doing pretty well, in functioning with the left knee and the left knee would be monitored. If plaintiff developed instability an ACL reconstruction and bracing would be considered (E8, p. 17).

Testing by Dr. McKenzie showed no leg length discrepancy.

On August 6, 2003, Dr. Morrison wrote that once the leg length

discrepancy was corrected with the heel lift, plaintiff's lower back symptoms would resolve. Dr. Morrison did anticipate any long-term impairment for a lower back condition.

There is no doubt that the plaintiff sustained a severe injury to his left leg on July 11, 2001. The parties agree that if the plaintiff is entitled to benefits, he is entitled to temporary total benefits beginning July 12, 2001, through August 7, 2002, and beginning again on October 24, 2003, and ending May 6, 2004.

On the issue of permanent benefits, I find plaintiff does not have a permanent impairment to his back. The plaintiff did suffer some back pain as a result of the injury to his left leg but has no permanent impairment. The permanent impairment to the left leg is 12 percent, as found by Dr. McKenzie and apparently agreed to by Dr. Morrison.

I further find that plaintiff is entitled to future medical care. The medical care in the future is for the injury to the left leg including the left knee with ligament injury.

Defendant argues that even though the plaintiff was an employee at the time of his injury on July 11, 2001, the plaintiff is not entitled to benefits because under the Immigration Reform and Control Act 8 U.S.C.A 1324 the plaintiff was an undocumented alien and was ineligible for employment by defendant. The plaintiff applied for a position with defendant and at the time of the application for employment the plaintiff marked yes in the box next to the question, "ARE YOU PREVENTED FROM LAWFULLY BECOMING EMPLOYED IN THIS COUNTRY BECAUSE OF VISA OR IMMIGRATION STATUS" (E1). Donald Albrecht, who is an owner and officer of the company, testified that potential employees sometimes misread this question and answer yes. Of note is that the plaintiff presented to defendant a falsified driver's license and social security card. The defendant no longer has a copy of the driver's license or social security card, but I find that a driver's license was presented to defendant. Plaintiff had to have assistance in preparing the application form and the I9 form because the plaintiff does not read, write, or speak English. The truth of the matter is, is that all the plaintiff wanted was a job so that he could earn some money.

It is defendant's theory that plaintiff is an unauthorized alien and ineligible for employment in the United States therefore the plaintiff is not entitled to workers' compensation benefits. In support of its agreement the defendant cites Hoffman Plastic Compounds, Inc. v. N.L.R.B., \_\_\_ U.S. \_\_\_, 122 S.Ct. 1275 (2002). In this case the United States Supreme Court held that an employee who was fired for

union activities was not entitled to back pay. The court held that back pay should not be awarded "to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by criminal fraud." The basis for this holding was immigration policy of the United States government. Hoffman Plastic Compounds, Inc. supra did not address whether or not an employee should be paid for work actually performed. It would certainly shock the conscience if an employer could hire unauthorized aliens, delay payment of wages, call the Immigration and Naturalization Service with the result that the employee be deported, and then not pay the employee for work actually performed. I find that unearned back pay is substantially different than earned wages due and owing for work performed for an employer. I further find plaintiff is entitled to payment of work actually performed for defendant.

The Nebraska Workers' Compensation Act was enacted in 1913. In 1917 the Supreme Court in *Parson v. Murphy*, 101 Neb. 542, 163 N.W. 847 (1917) discussed the purpose of the workers' compensation act and stated:

The act is one of general interest, not only to the workman and to his employer, but as well as to the state, and it should be so construed the technical refinements of interpretation will not be permitted to defeat it. Among its objects are these: That the cost of the injury may be charged to the industry in which it occurs; the prevention of tedious and costly litigation; a speedy settlement between employer and employee; and to prevent dependent persons from becoming a public burden 163 N.W. at page 848.

A reading of *Parsons* shows that there are three players involved in a workers' compensation claim. The players are the employee, employer, and the state. The state has an interest because when worker' compensation benefits are denied someone will pay the medical bills; be it the hospital and physicians that will not be paid, or Medicaid. There is also a potential claim for welfare.

The medical bills in this case total approximately \$75,000.00 which if not paid by the employer (industry) will be paid by local healthcare providers or the state of Nebraska under Medicaid. The employer and industry receive the benefits of plaintiff's labor and must pay the cost of injuries sustained by the employee. See also § 48-120 which requires an employer to pay for all reasonable, medical, surgical, and hospital services as and when needed which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment.

Defendant argues that under *Hilt Truck Lines, Inc. v. Jones*, 204 Neb.

115, 281 N.W.2d. 399 (1979) the plaintiff is not entitled to workers' compensation benefits because had not the plaintiff misrepresented his status to seek employment and be employed in the United States, the employee would not have been hired and thus he would not have suffered an injury. In Hilt the Nebraska Supreme Court quoted from Larson, Workers' Compensation law as follows:

-----  
-----  
The general rule is set out in 1 B. Larson workers' compensation law, 47.53, page 8-201:

[I]t has been held that employment which has been obtained by the making of false statements -- even criminally false statements -- whether by a minor or an adult, is still employment; that is, the technical illegality will not of itself destroy compensation coverage. \* \* \* The following factors must be present before a false statement in an employment application will bar benefits: (1) The employee must have knowingly and wilfully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury.

In this case the plaintiff made a false representation on his ability to be employed in the United States. The plaintiff did not misrepresent his physical condition. Furthermore, the fact that the plaintiff misrepresented his status was not a proximate cause of the injury. There should be no differentiation in benefits due an unauthorized alien and one legally employed when the cause of the injury is a cement bucket slipping off a hook.

Neither the Immigration Reform and Control Act nor Hill Truck Lines, Inc. v. Jones supra bar plaintiff's recovery of workers' compensation benefits for the injury he suffered on July 11, 2001.

Plaintiff claims he is entitled to a loss of earning power because he has a loss of use of the left ankle and the left knee. It is plaintiff's theory that this is a double member disability even though loss of use is two parts of one extremity. First of all, the physicians (Dr. McKenzie and Dr. Morrison) treat plaintiff's injury as to the leg. I previously found the plaintiff has a 12 percent loss of use of the left leg. Even if one was to find a loss of use of the left foot and the left knee, the plaintiff would not be entitled to benefits for a loss of earning power because while § 48-121(3) states:

In all other cases involving a loss of use of both hands, both arms, both feet, both legs, both eyes, or hearing in both ears, or of any two thereof, total permanent disability shall be determined in accordance with the facts.

The plaintiff is not entitled to a multiple member award when only one extremity is injured. In this case the plaintiff is limited to benefits for a 12 percent loss of use of his left leg.

Plaintiff claims vocational rehabilitation benefits. Under § 48-162.01(3) an employee is entitled to vocational rehabilitation services when he or she is unable to perform suitable work for which he or she has previous training or experience. Suitable employment is defined as that which is compatible with the employee's pre-injury occupation, age, education, and aptitude and similar in remuneration to earnings before the injury. *Yager v. Bellco Midwest*, 236 Neb. 888, 464 N.W.2d. 335 (1991). Plaintiff's average weekly wage at the time of his injury \$436.58. This equals approximately \$10.91 per hour. Assuming plaintiff could be hired there are no potential positions available for the plaintiff that pay \$10.00 an hour and as a result there is no suitable employment available to the plaintiff. Assuming again that the plaintiff could obtain employment and was not an unauthorized alien, the plaintiff, because of his restrictions and education, would be entitled to a period of formal retraining which is designed to lead to employment in another career field. All other priorities are eliminated because the plaintiff is either unable to perform the work or the proposed position pays an inadequate amount considering plaintiff's prior hourly wage and average weekly wage.

The defendant objects to an award of vocational rehabilitation services because no matter what rehabilitation services are offered the plaintiff is unable to obtain any employment in the United States. Plaintiff argues that he is entitled to rehabilitation services consisting of English as a second language, which is retraining, because this is speculation as to plaintiff's immigration status when he completes English as a second language. It also transfers the cost of the injury from industry or the employer to the employee and the state.

At the present time plaintiff cannot legally be employed in the United States. The question then becomes should the employer have to pay to retrain an injured employee for employment in his native country. It would be useless to retrain an injured employee for work in the United States when he cannot work in the United States. On the other hand plaintiff will have to return to his home country with limitations on his ability to work in labor positions. He cannot perform the jobs no

matter how much they pay, for which he has training or experience be the job in be in the United States or his native country. Industry benefited from plaintiff's labor and should pay to retrain plaintiff so he can work in his native country. Industry is not allowed to transfer the cost of employee injures to the state, be it the state of Nebraska or plaintiff's native country. Plaintiff is entitled to vocational rehabilitation services. If plaintiff desires vocational rehabilitation services he shall contact the court within 30 days of the date this Award becomes final.

The parties agree on the period of temporary benefits. The plaintiff has a 12 percent loss of use of his left leg. This entitles plaintiff to 25.8 weeks of benefits.

Plaintiff's temporary and permanent benefits are as follows:

DATE	WEEKS	AMOUNT	TYPE
07/12/01 to 08/07/02	56.0	\$291.05 per week	Temporary Total
08/08/02 to 10/23/03	25.8	\$291.05 per week	12 percent loss of use of left leg
10/24/03 to 05/06/04	28.0	\$291.05 per week	Temporary Total

It appears that all medical expenses have been paid. See Exhibit 46. Defendant is entitled to credit for payments made to plaintiff as shown on Exhibit 46.

Plaintiff claims future medical care. The evidence shows that plaintiff needs future medical care all as required by § 48-120. Plaintiff is awarded said future medical care.

No penalties or attorney's fees are due plaintiff.

IT IS ORDERED.

1. Plaintiff have and recover the temporary and permanent benefits set forth above.

Defendant is given credit for payments made as shown on Exhibit 46.

Plaintiff is entitled to future medical care all as required by § 48-120.

4. Plaintiff is entitled to vocational rehabilitation services as set forth above.

Dated at Lincoln, Lancaster County, Nebraska, on this 29th day of September, 2004.

NEBRASKA WORKERS' COMPENSATION COURT

/s/J. Michael Fitzgerald

JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Award was sent by ordinary United States mail, first class postage prepaid, on this 29th day of September, 2004, addressed as shown below, to the following:

Todd D. Bennett  
Attorney At Law  
Rehm, Bennett & Moore P.C.  
3701 Union Drive #200  
P.O. Box 22067  
Lincoln, NE 68516 Jenny L. Panko

/s/Kay Peterson/kg Clerk, Nebraska Workers' Compensation Court

kg-

DOC: 201 NO: 2525

Page 8

Document Properties

Title: IN THE NEBRASKA WORKERS' COMPENSATION COURT

Author: NE WCC

Template: Normal.dot

Last saved by: NE WCC

Revision number: 13

Application: Microsoft Word 9.0

Document Properties

Company: Workers Compensation Court

Plaintiff: Todd D. Bennett  
Rehm Bennett & Moore, P. C.  
3701 Union Drive #200  
P. O. Box 22067  
Lincoln, NE 68516

This matter came on for trial on July 13, 2004.

After trial plaintiff submitted Exhibit 51 which was received into evidence.

On July 11, 2001, plaintiff was employed by defendant as a laborer. On said date plaintiff was working on a concrete crew. His job was to see that concrete was put in a big pot which was then raised up by a crane and moved to the location where the concrete was to be poured. On July 11, 2001, the pot was full, and as the pot was being raised up it fell off the hook and struck plaintiff in the head; left arm; and left knee to his foot.

Plaintiff was taken by ambulance to the Great Plains Regional Medical Center where the emergency room notes show a history as follows:

A cement bucket that was on a loader fell, glanced off his head, and landed on his left leg causing a compound fracture of his tibia. It is comminuted and he has an open wound. He has not eaten since yesterday. He is good health. He does not speak English at all (E9, pp. 2 - 5).

Plaintiff came under the care of Dr. Mark McKenzie, an orthopaedic surgeon. Dr. McKenzie's admitting diagnosis was a grade III, open comminuted tibiofibular fracture to his left leg. This was a midshaft fracture which required external fixator application and fasciotomies. Plaintiff was admitted; underwent surgeries; and was discharged from the hospital on July 19, 2001 (E9, p. 18). It should be noted that in the surgery Dr. McKenzie examined plaintiff's left knee and found an injury to the posterior cruciate ligament and anterior cruciate ligament (E9, p. 8).

On November 14, 2001, Dr. McKenzie removed the external fixator and applied a short leg cast. On December 13, 2001, Dr. McKenzie recommended that plaintiff start weight bearing. On February 8, 2002, the cast was removed and plaintiff was placed in a cam walker. On April 17, 2002, Dr. McKenzie allowed plaintiff to work four hours per day, no climbing or lifting greater than 25 pounds. Defendant had no job available for plaintiff. Plaintiff did not return to work.

On July 16, 2002, plaintiff attended a functional capacity evaluation at Good Samaritan Health Systems (E10). The recommendations of the functional capacity evaluation were that plaintiff should seek full-time employment within the medium work level. This is noted to be lifting 50 pounds occasionally, 25 pounds frequently, and 10 pounds constantly. Mobility tasks to include walking, static and dynamic standing, squatting, and kneeling should be limited to the occasional work level category. The plaintiff would benefit from being allowed to alternate sitting and standing at least every two hours for pain management reasons. Plaintiff should continue to utilize JOVST compression stockings to control edema and continue his home exercise program.

On July 18, 2002, (E9, p. 10) Dr. McKenzie found plaintiff has a 5 percent left lower extremity impairment, and he should follow the recommendation of the functional capacity evaluation in terms of his future work. It was noted that plaintiff a very very slight limp.

On November 20, 2002, plaintiff returned to Dr. McKenzie with complaints of pain around the front of the left knee and also that the knee goes out on him intermittently. An injury to the left knee had been noted on July 11, 2001. The injury to the anterior cruciate ligament was causing some problems. Plaintiff was referred to physical therapy and rehab. Dr. McKenzie noted plaintiff may at some point need ACL reconstruction. Plaintiff was fitted with a don joy derotational brace.

Plaintiff was examined by Dr. McKenzie on December 20, 2002, and on December 26, 2002 (E8, p. 13). Dr. McKenzie wrote that plaintiff could be actively working as tolerated. Plaintiff was to minimize kneeling, squatting, or pivoting on the left lower extremity. Plaintiff could lift up to 50 pounds.

On April 2, 2003, Dr. McKenzie examined plaintiff and wrote that plaintiff has instability of his left knee secondary to mild ACL insufficiency. Plaintiff has a 7 percent lower extremity disability (impairment) due to this left knee instability. Dr. McKenzie also wrote:

Should be noted that it is possible that with time, he could develop further instability symptoms potentially and if this is the case, he might require eventually an ACL reconstruction and this was discussed with him through his interpreter (E8, p. 14).

On April 30, 2003, Dr. McKenzie wrote that plaintiff has a 5 percent

impairment due to superficial peroneal nerve and deep peroneal nerve injury that was suffered as a result of an open injury to the left tibia and an additional 7 percent due to ACL insufficiency. The combined values chart in the Evaluation of Permanent Impairments, 4th edition entitles plaintiff to a 12 percent disability involving his left lower extremity.

Also in the letter of April 30, 2003, Dr. McKenzie wrote that plaintiff's back problems were never brought to his attention and his notes show no evidence of any history of back problems. The comment about a back injury was in response to a report prepared March 11, 2003, by Dr. David W. Lauer (E11). Dr. Lauer had examined plaintiff for purposes of an impairment rating. Plaintiff complained of constant pain in his left knee and calf. The pain was increased with activities such as prolonged standing or walking up stairs. Dr. Lauer found plaintiff has moderate collateral and cruciate ligament laxity on the left which entitles him to a 10 percent whole person impairment. Using Exhibit 51 a 10 percent whole person impairment constitutes a 24 percent impairment of the left lower extremity. Plaintiff also has a 5 percent whole person impairment from the peripheral nerve damage, peroneal nerve of 5 percent. According to Exhibit 51 this would equal a 12 percent impairment of the left lower extremity. Plaintiff also has a 7 percent whole person impairment from the lumbar spine. The lumbar spine impairment is rated due to loss of motion.

On August 6, 2003, plaintiff was examined by Dr. Michael Morrison, an orthopedic surgeon. Dr. Morrison examined plaintiff and it was his impression:

1. Status post open comminuted fracture distal third left tibia and fibula requiring irrigation and debridement with external fixation device application.
2. Status post fasciotomies left lower leg.
3. Probable anterior cruciate ligament insufficiency left knee.
4. Leg length discrepancy, left longer than right, causing lumbar strain.
5. Possible peripheral nerve injury left lower leg.

Dr. Morrison recommended a heel/sole lift in his right shoe to compensate for his leg length discrepancy on the left which is probably contributing to some lumbar strain. Dr. Morrison recommended an MRI of the left knee and EMG and nerve conduction studies of his left leg.

On October 24, 2003, plaintiff had an MRI at Good Samaritan Hospital. The impression of the radiologist was "tear of the anterior cruciate ligament" (E16, p. 1).

On October 24, 2003, plaintiff was examined by Dr. W. M. Suleiman, a

specialist in physical medicine and rehabilitation (E15). Dr. Suleiman performed an EMG and noted findings were suggestive of:

Lumbar radiculopathy, mild, at bilateral L4-L5, left side more affected.  
2. Left common peroneal nerve is showing slight delay in distal latency, which is most probably secondary to traumatic scarring tissue, which is expected to improve in time.

Also on October 24, 2003, plaintiff was examined by Dr. Patrick Moore, D. P. M. Dr. Moore treated a leg length discrepancy. Plaintiff was fitted for a polypropylene device with a one-quarter inch heel lift to the right. On January 6, 2004, plaintiff returned to Dr. Moore. The plaintiff was wearing the heel lift most of the time. The plaintiff noticed a little difference in his back discomfort.

On January 7, 2004, plaintiff saw Dr. McKenzie for a recheck. Plaintiff's left knee was doing pretty well, in functioning with the left knee and the left knee would be monitored. If plaintiff developed instability an ACL reconstruction and bracing would be considered (E8, p. 17).

Testing by Dr. McKenzie showed no leg length discrepancy.

On August 6, 2003, Dr. Morrison wrote that once the leg length discrepancy was corrected with the heel lift, plaintiff's lower back symptoms would resolve. Dr. Morrison did anticipate any long-term impairment for a lower back condition.

There is no doubt that the plaintiff sustained a severe injury to his left leg on July 11, 2001. The parties agree that if the plaintiff is entitled to benefits, he is entitled to temporary total benefits beginning July 12, 2001, through August 7, 2002, and beginning again on October 24, 2003, and ending May 6, 2004.

On the issue of permanent benefits, I find plaintiff does not have a permanent impairment to his back. The plaintiff did suffer some back pain as a result of the injury to his left leg but has no permanent impairment. The permanent impairment to the left leg is 12 percent, as found by Dr. McKenzie and apparently agreed to by Dr. Morrison.

I further find that plaintiff is entitled to future medical care. The medical care in the future is for the injury to the left leg including the left knee with ligament injury.

Defendant argues that even though the plaintiff was an employee at the time of his injury on July 11, 2001, the plaintiff is not entitled to

benefits because under the Immigration Reform and Control Act 8 U.S.C.A 1324 the plaintiff was an undocumented alien and was ineligible for employment by defendant. The plaintiff applied for a position with defendant and at the time of the application for employment the plaintiff marked yes in the box next to the question, "ARE YOU PREVENTED FROM LAWFULLY BECOMING EMPLOYED IN THIS COUNTRY BECAUSE OF VISA OR IMMIGRATION STATUS" (E1). Donald Albrecht, who is an owner and officer of the company, testified that potential employees sometimes misread this question and answer yes. Of note is that the plaintiff presented to defendant a falsified driver's license and social security card. The defendant no longer has a copy of the driver's license or social security card, but I find that a driver's license was presented to defendant. Plaintiff had to have assistance in preparing the application form and the I9 form because the plaintiff does not read, write, or speak English. The truth of the matter is, is that all the plaintiff wanted was a job so that he could earn some money.

It is defendant's theory that plaintiff is an unauthorized alien and ineligible for employment in the United States therefore the plaintiff is not entitled to workers' compensation benefits. In support of its agreement the defendant cites Hoffman Plastic Compounds, Inc. v. N.L.R.B., \_\_\_\_ U.S. \_\_\_\_, 122 S.Ct. 1275 (2002). In this case the United States Supreme Court held that an employee who was fired for union activities was not entitled to back pay. The court held that back pay should not be awarded "to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by criminal fraud." The basis for this holding was immigration policy of the United States government. Hoffman Plastic Compounds, Inc. supra did not address whether or not an employee should be paid for work actually performed. It would certainly shock the conscience if an employer could hire unauthorized aliens, delay payment of wages, call the Immigration and Naturalization Service with the result that the employee be deported, and then not pay the employee for work actually performed. I find that unearned back pay is substantially different than earned wages due and owing for work performed for an employer. I further find plaintiff is entitled to payment of work actually performed for defendant.

The Nebraska Workers' Compensation Act was enacted in 1913. In 1917 the Supreme Court in Parson v. Murphy, 101 Neb. 542, 163 N.W. 847 (1917) discussed the purpose of the workers' compensation act and stated:

The act is one of general interest, not only to the workman and to his employer, but as well as to the state, and it should be so construed the technical refinements of interpretation will not be permitted to defeat

it. Among its objects are these: That the cost of the injury may be charged to the industry in which it occurs; the prevention of tedious and costly litigation; a speedy settlement between employer and employee; and to prevent dependent persons from becoming a public burden 163 N.W. at page 848.

A reading of Parsons shows that there are three players involved in a workers' compensation claim. The players are the employee, employer, and the state. The state has an interest because when worker' compensation benefits are denied someone will pay the medical bills; be it the hospital and physicians that will not be paid, or Medicaid. There is also a potential claim for welfare.

The medical bills in this case total approximately \$75,000.00 which if not paid by the employer (industry) will be paid by local healthcare providers or the state of Nebraska under Medicaid. The employer and industry receive the benefits of plaintiff's labor and must pay the cost of injuries sustained by the employee. See also § 48-120 which requires an employer to pay for all reasonable, medical, surgical, and hospital services as and when needed which are required by the nature of the injury and which will relive pain or promote and hasten the employee's restoration to health and employment.

Defendant argues that under Hilt Truck Lines, Inc. v. Jones, 204 Neb. 115, 281 N.W.2d. 399 (1979) the plaintiff is not entitled to workers' compensation benefits because had not the plaintiff misrepresented his status to seek employment and be employed in the United States, the employee would not have been hired and thus he would not have suffered an injury. In Hilt the Nebraska Supreme Court quoted from Larson, Workers' Compensation law as follows:

-----  
-----

The general rule is set out in 1 B. Larson workers' compensation law, 47.53, page 8-201:

[I]t has been held that employment which has been obtained by the making of false statements -- even criminally false statements -- whether by a minor or an adult, is still employment; that is, the technical illegality will not of itself destroy compensation coverage. \* \* \* The following factors must be present before a false statement in an employment application will bar benefits: (1) The employee must have knowingly and wilfully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in

the hiring. (3) There must have been a causal connection between the false representation and the injury.

In this case the plaintiff made a false representation on his ability to be employed in the United States. The plaintiff did not misrepresent his physical condition. Furthermore, the fact that the plaintiff misrepresented his status was not a proximate cause of the injury. There should be no differentiation in benefits due an unauthorized alien and one legally employed when the cause of the injury is a cement bucket slipping off a hook.

Neither the Immigration Reform and Control Act nor *Hill Truck Lines, Inc. v. Jones* supra bar plaintiff's recovery of workers' compensation benefits for the injury he suffered on July 11, 2001.

Plaintiff claims he is entitled to a loss of earning power because he has a loss of use of the left ankle and the left knee. It is plaintiff's theory that this is a double member disability even though loss of use is two parts of one extremity. First of all, the physicians (Dr. McKenzie and Dr. Morrison) treat plaintiff's injury as to the leg. I previously found the plaintiff has a 12 percent loss of use of the left leg. Even if one was to find a loss of use of the left foot and the left knee, the plaintiff would not be entitled to benefits for a loss of earning power because while § 48-121(3) states:

In all other cases involving a loss of use of both hands, both arms, both feet, both legs, both eyes, or hearing in both ears, or of any two thereof, total permanent disability shall be determined in accordance with the facts.

The plaintiff is not entitled to a multiple member award when only one extremity is injured. In this case the plaintiff is limited to benefits for a 12 percent loss of use of his left leg.

Plaintiff claims vocational rehabilitation benefits. Under § 48-162.01(3) an employee is entitled to vocational rehabilitation services when he or she is unable to perform suitable work for which he or she has previous training or experience. Suitable employment is defined as that which is compatible with the employee's pre-injury occupation, age, education, and aptitude and similar in remuneration to earnings before the injury. *Yager v. Belco Midwest*, 236 Neb. 888, 464 N.W.2d. 335 (1991). Plaintiff's average weekly wage at the time of his injury \$436.58. This equals approximately \$10.91 per hour. Assuming plaintiff could be hired there are no potential positions available for the plaintiff that pay \$10.00 an hour and as a result there is no suitable employment available to the plaintiff. Assuming again that the

plaintiff could obtain employment and was not an unauthorized alien, the plaintiff, because of his restrictions and education, would be entitled to a period of formal retraining which is designed to lead to employment in another career field. All other priorities are eliminated because the plaintiff is either unable to perform the work or the proposed position pays an inadequate amount considering plaintiff's prior hourly wage and average weekly wage.

The defendant objects to an award of vocational rehabilitation services because no matter what rehabilitation services are offered the plaintiff is unable to obtain any employment in the United States. Plaintiff argues that he is entitled to rehabilitation services consisting of English as a second language, which is retraining, because this is speculation as to plaintiff's immigration status when he completes English as a second language. It also transfers the cost of the injury from industry or the employer to the employee and the state.

At the present time plaintiff cannot legally be employed in the United States. The question then becomes should the employer have to pay to retrain an injured employee for employment in his native country. It would be useless to retrain an injured employee for work in the United States when he cannot work in the United States. On the other hand plaintiff will have to return to his home country with limitations on his ability to work in labor positions. He cannot perform the jobs no matter how much they pay, for which he has training or experience be the job in be in the United States or his native country. Industry benefited from plaintiff's labor and should pay to retrain plaintiff so he can work in his native country. Industry is not allowed to transfer the cost of employee injures to the state, be it the state of Nebraska or plaintiff's native country. Plaintiff is entitled to vocational rehabilitation services. If plaintiff desires vocational rehabilitation services he shall contact the court within 30 days of the date this Award becomes final.

The parties agree on the period of temporary benefits. The plaintiff has a 12 percent loss of use of his left leg. This entitles plaintiff to 25.8 weeks of benefits.

Plaintiff's temporary and permanent benefits are as follows:

DATE	WEEKS	AMOUNT	TYPE	07/12/01 to 08/07/02	56.0	\$291.05 per week
Temporary Total	08/08/02 to 10/23/03	25.8	\$291.05 per week	12 percent		
loss of use of left leg	10/24/03 to 05/06/04	28.0	\$291.05 per week			
Temporary Total						

It appears that all medical expenses have been paid. See Exhibit

46. Defendant is entitled to credit for payments made to plaintiff as shown on Exhibit 46.

Plaintiff claims future medical care. The evidence shows that plaintiff needs future medical care all as required by § 48-120. Plaintiff is awarded said future medical care.

No penalties or attorney's fees are due plaintiff.

IT IS ORDERED.

1. Plaintiff have and recover the temporary and permanent benefits set forth above.

Defendant is given credit for payments made as shown on Exhibit 46.

Plaintiff is entitled to future medical care all as required by § 48-120.

4. Plaintiff is entitled to vocational rehabilitation services as set forth above.

Dated at Lincoln, Lancaster County, Nebraska, on this 29th day of September, 2004.

NEBRASKA WORKERS' COMPENSATION COURT

/s/J. Michael Fitzgerald

JUDGE

#### CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Award was sent by ordinary United States mail, first class postage prepaid, on this 29th day of September, 2004, addressed as shown below, to the following:

Todd D. Bennett  
Attorney At Law  
Rehm, Bennett & Moore P.C.  
3701 Union Drive #200  
P.O. Box 22067  
Lincoln, NE 68516 Jenny L. Panko

/s/Kay Peterson/kg Clerk, Nebraska Workers' Compensation Court

kg-

DOC: 201 NO: 2525

Page 8

Document Properties

Title: IN THE NEBRASKA WORKERS' COMPENSATION COURT

Author: NE WCC

Template: Normal.dot

Last saved by: NE WCC

Revision number: 13

Application: Microsoft Word 9.0

Document Properties

Company: Workers Compensation Court