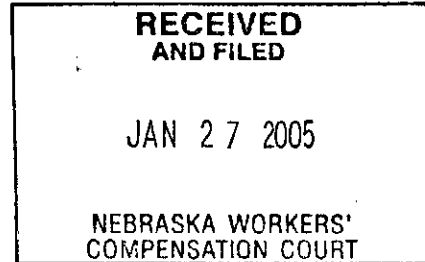


IN THE NEBRASKA WORKERS' COMPENSATION COURT

SANDRA FINLEY,)
)
Plaintiff,)
)
vs.)
)
DRIVERS MANAGEMENT, INC.,)
)
Defendant.)

DOC: 203 NO: 2525

AWARD



APPEARANCES:

Plaintiff: James R. Harris
Harris Law Offices
3400 'O' Street
P.O. Box 30886
Lincoln, NE 68503-0886

Defendant: Daniel R. Fridrich
P.O. Box 45308
Omaha, NE 68145-0308

This matter comes on for trial this 12th day of August, 2004, in Lincoln, Lancaster County, Nebraska.

I.

Since September 1998, plaintiff has been a driver and/or owner operator for Werner and/or Drivers Management, Inc. Drivers Management Inc., is a subsidiary of Werner which hires drivers for Werner. Before plaintiff went to work for Werner, she had worked with the elderly, had worked as a hairdresser, and worked as a cook in a tavern.

Medical records show that on July 13, 1993, plaintiff complained to Dr. William Mellor that her hands and arms were numb. Plaintiff explained that the numbness comes and goes and that the right side is worse than the left side. On July 11, 1993, both hands were very swollen and the plaintiff could not hold a cup of coffee or write. The plaintiff also had chest pain located to the left side of her chest which radiated pain down her left arm and up into the left side of her neck. According to the plaintiff, this began about one year ago. Dr. Mellor examined the plaintiff and his impression was: atypical chest pain probably associated with dyspepsia and carpal tunnel syndrome.

Dr. Mellor started plaintiff on Lodine and was placed in a cock up splint (E19, p. 9). Plaintiff returned to Dr. Mellor on July 27, 1993, for a follow-up of her physical exam. Plaintiff was still having problems with the wrist brace and further stated that it didn't seem to be helping very much. Plaintiff did feel that the Lodine was helping a little bit. There was a discussion about diet and cholesterol. The plaintiff advised Dr. Mellor that she didn't want anything done about her carpal tunnel at this time. Plaintiff was going to continue taking the Lodine and wearing the brace for the next three months and was instructed to check back with Dr. Mellor's office to see how her carpal tunnel and Lipids were doing.

On November 13, 1994, the plaintiff was examined by Dr. Bryan Johnson (E18, p. 10-11). Plaintiff had been in the emergency room for a sudden onset of numbness in her hands and a little bit in her leg. Plaintiff stated that she had bumped her right hand on a door earlier that evening and then started developing numbness in her right hand and pain in her right arm. This pain extended all the way up to her shoulder. Dr. Johnson was advised that a year ago Dr. Mellor had diagnosed some mild carpal tunnel symptoms, but they went away with the splint that she wore. Dr. Johnson's impression was: paresthesias in the hands due to carpal tunnel. Dr. Johnson suspected that hyperventilation played a big role in plaintiff's bilateral symptoms, and was told that if the numbness did not go away, she was to return his office. The plaintiff testified that after 1994, she had no more problems with her hands.

Exhibit 13 is the Qualcom records from the defendant. Qualcom is a computer generated record of type written communications between a truck driver and the defendant's dispatcher. The plaintiff's truck number is 32500. Messages from 32500 originate with plaintiff. Messages from all others originate from defendant. These Qualcom records are from the period of January 13, 2002, through February 1, 2002. The Qualcom records are difficult to read, but this is my understanding of them, summarized and restated:

On January 14, 2002, plaintiff emptied a load in Marcy, New York. The time is shown to be 16:06:37 (E13, p. 4). At 16:08:26 on January 14, 2002, plaintiff received a two load order. Plaintiff was to go to K & R Kids, LLC, in Avenel, New Jersey, to load and then drive to Bentonville, Arkansas (E13, p. 5).

It would appear that on January 15, 2002, at 10:27:59, plaintiff was near K/R Kids LLC, in Avenel, New Jersey. This is because plaintiff was asking for directions (E13, p. 8). In Exhibit 13 at page 9, it is noted that the plaintiff completed loading on January 15, 2002, at 12:24:48. Plaintiff resumed driving at 12:27:56, on January 15, 2002. It appears that the plaintiff stopped driving and was in the truck getting rest at 18:48:31, on January 15, 2002.

On January 16, 2002, at 4:40:26, the plaintiff advised that she did not yet start to drive because it was too windy (E13, p. 10). Exhibit 13 at page 11 notes that plaintiff resumed driving on January 16, 2002, at 5:10:17. Plaintiff drove off and on the rest of January 16, 2002.

On January 17, 2002 (E13, p. 14), plaintiff received a raise in pay from .27 cents per mile to .3 cents per mile. Plaintiff was driving on January 17, 2002, and arrived at the Consignee who I believe to be the Wal-Mart store in Bentonville, Arkansas, at 9:07:16 (E13, p. 14). On January 17, 2002, at 9:44:07, plaintiff was given another load to two locations. The first location was in Lamar, Missouri, and the second stop was in Mt. Pleasant, Iowa. At 9:50:07, January 17, 2002, plaintiff left Bentonville, Arkansas, and at 11:44:11 on January 17, 2002, arrived at Lamar, Missouri, where she was to be loaded (E13, p. 16).

On page 17 of Exhibit 13, there is an exchange between the dispatcher and plaintiff. Plaintiff asked if there was a plan to get her home to Palouse, Washington, by the 23rd or 24th of this month. The dispatcher answers yes. The plaintiff wrote, "I knew tht-just wnted 2 chck" [I knew that-just wanted to check]. Plaintiff also asked the dispatcher, "r u ok? U don't seem like urself [yourself]". The dispatcher responded, "I'm okay, how are you?" Plaintiff responded, "Gr—88888, aft I got tht mess ths am abt my pay raise" [Great, after I got that message this morning about my pay raise]. Dispatcher responded, "that's pretty cool, you are up there". Plaintiff wrote, "I'm a big trk [truck] driver now". An entry for 13:53:49 on January 17, 2002, shows that the plaintiff had completed loading. Exhibit 13, shows plaintiff stayed in her truck until January 18, 2002, when she resumed driving at 7:29:05. Plaintiff drove until 8:34:25, when she got out of her truck. A reasonable interpretation of Exhibit 13 is that plaintiff left the shippers location in Lamar, Missouri, at 7:29:05, on January 18, 2002, and drove for 1 hour and 5 minutes. An entry at 8:58:56, on January 18, 2002, shows that plaintiff advised dispatch, "Chris-I'm weighin and tryin 2 mv [move] tandems-it hd [had] snowed all day and nght and it got dwn in the low 20's so everything is frozen-but I thnk I mght hv [have] it nw [now]".

At 9:25:34 on January 18, 2002, plaintiff resumed driving. On January 18, 2002, at 13:13:49, plaintiff advised dispatch that it was important for her to get home because she had a couple of doctor appointments on Friday, January 25, 2002. Dispatch advised plaintiff that they were working on it.

Exhibit 13 shows that the plaintiff made the drop in Iowa, picked up another load, made a delivery, and arrived in Spokane, Washington, on January 24, 2002. At 12:52:35 on January 24, 2002, plaintiff had been unloaded and she expressed that she was not available until January 31, 2002, because she was home and she had doctors appointments.

The plaintiff testified that on January 15, 2002, she was in North Joplin, Missouri, because she had to move the tires on her rig and in order to do so, you must pull a pin. Plaintiff testified that she shook the truck because it was icy. She got under the truck and used both hands to pull the pin. Her arm slipped and her right shoulder hit the trailer and she landed on her left side. Plaintiff testified that she continued to work that day. She was in pain and she was going to go home. The

plaintiff further testified that she thought she told the dispatcher over the Qualcom. The Qualcom records show that on January 18, 2002, plaintiff had difficulty moving the tandems, but does not show an injury. There is evidence in the record that plaintiff had felt pain in her arms when she had to pull the pin, but it always seemed to go away. Plaintiff kept driving after the incident and made it home, but it was a difficult drive through the ice and snow. The plaintiff testified that she saw her eye doctor on January 25, 2002. She further testified that she thought she would get better if she stayed home and rested while on leave. On January 29, 2002, plaintiff went to Whitman Hospital and Medical Center emergency room (E18, pp.20-22). The nurse's notes, from the aforementioned day, explains that the plaintiff was having right shoulder pain that started two weeks ago. The nurse further noted that plaintiff drives a semi truck and that she doesn't recall how she injured her arm. Plaintiff explained to the nurse that the swelling in her arm started 10 days ago and that she had been taking Ibuprofen, Tylenol, and Aleve, but there was no relief. Plaintiff was examined by Dr. Bryan Johnson. The following are the events of what took place in the emergency room on January 29, 2002.

CHIEF COMPLAINT:

"I hurt my right shoulder."

HISTORY OF PRESENT ILLNESS: The patient is a 45-year-old woman who presents to ER complaining of right shoulder pain. She hurt it two weeks ago while she was on the road driving a truck. She had to pull hard with her right arm to remove a couple of pins to adjust tires and also pulls hard on that right side to shift her truck. She strained it two weeks ago and has been having severe pain in that shoulder ever since. The pain seems to go from the right side of her neck down the right shoulder and down to her right arm. At times, it tingles in her right hand. Along with it, she has had right chest wall pain. She states, whenever she pulls, it hurts in the right chest wall, anteriorly, posteriorly and behind her shoulder blade, and then it aches into her shoulder. She has a difficult time lifting the shoulder. The pain has been fairly intense. . . . (E18, p. 21).

Dr. Johnson examined plaintiff and his impression was: right shoulder sprain occurring at work. Plaintiff could barely move her arm and there was no way she could drive an 18-wheeler. Dr. Johnson felt that plaintiff's chest pain was most likely a musculoskeletal strain and was given medication and told to return to his office in two weeks.

Records show that on January 31, 2002, plaintiff called the defendant, advised them of the incident and a first report was prepared. Notes from that conversation of January 31, 2002, are contained in Exhibit 20, page 2. According to the plaintiff, the incident occurred in Lamar, Missouri the morning of January 15, 2002. She indicated that she had a sprain in her right shoulder that radiated pain into the chest and back down her arm. In Exhibit 20, page 2, the plaintiff stated, "pulling tandem pin and hurt right shoulder, apparently. I'm figuring that this is what happened." This is not plaintiff's handwriting on page 2 of Exhibit 20.

The plaintiff returned to Dr. Johnson on February 13, 2002 (E2, p. 1). The plaintiff was still having severe problems with neck and shoulder pain which radiated down her arm. She also had a numbness and tingling sensation down the arm. X-rays showed a mild degenerative joint disease at C6-7. Dr. Johnson's impression was: neck pain/shoulder pain. Dr. Johnson was suspicious of radicular symptoms from her neck causing the problem and a MRI was ordered. Plaintiff was miserable and could not go back to work. An MRI on February 14, 2002, showed very mild cervical spondylosis at C4-5, C5-6, and C6-7 with slight disc bulges. No herniated disc, spinal stenosis or foraminal encroachment (E14, p.1). On February 19, 2002, plaintiff returned to Dr. Johnson with shoulder pain. Plaintiff stated she was miserable, with numbness down the arm. Per the MRI, Dr. Johnson's impression was shoulder pain with no evidence of radiculopathy. Plaintiff was referred to Dr. French for an orthopedic consultation. Dr. Johnson suspected that plaintiff had suffered from some type of brachial plexus injury (E2, p.4).

On February 19, 2002, plaintiff was seen by Dr. French, an orthopedic surgeon at Three Forks Orthopaedics. According to the patient medical history questionnaire filled out by plaintiff, she described her injury as, "right shoulder and under the arm, arm goes numb." (E3, p.1). Dr. French's notes from February 19, 2002, are as follows,

Chief Complaint: Right arm pain and numbness.

How: Pulling a locking pin on a tractor-trailer.

When: 15 January 2002.

Where: Missouri

History: This is a 45-year-old, right-handed woman truck driver, who was trying to pull a connector pin on her trailer in Missouri during an ice/snow storm. The pin stuck. She felt something pop in her shoulder, and it felt like bones slipped. She had acute, severe, shoulder pain and arm numbness. She has had several other pulling injuries over the years, where she has had similar feelings, but none this severe, and she has always recovered in a day or two. At two weeks after the injury, it felt like it was continuing to get worse. She was seen by Dr. Johnson, who obtained and **MRI of her right upper cervical spine**, which was basically normal, with some mild degenerative changes. . . .

On exam: She has diffuse numbness and aching down the arm. She is exquisitely tender over both her supra- and infraclavicular brachial plexus. . . . She is exquisitely tender all around the shoulder. She has a grade 3 anterior compression shift. . . .

Impression: Anterior/inferior subluxation/dislocation of the right shoulder with a traction brachial plexus injury.

Recommendation: McConnell taping and physical therapy. We'll recheck her in four weeks. We'll start her on Dilantin 100mg hs to settle down her nerve hypersensitivity and give her #60 Lortab 7.5 for pain control, particularly at night; Elavil 50mg at night for sleep. . . .(E3, p. 4)

Plaintiff started physical therapy at Pullman Sports Physical Therapy (E4). Plaintiff was evaluated on February 27, 2002. The history was that the plaintiff injured her right shoulder while pulling a pin out of a truck. She has had minor irritation in the past, but this time the pain was more severe and her sleep has been poor for several weeks. Plaintiff had some significant improvement from McConnell taping techniques. Plaintiff was very guarded at the shoulder and was uncomfortable with any movement.

On March 15, 2002, plaintiff returned to Dr. French for a follow-up on her right cervicobrachial syndrome. Plaintiff was doing a little better. Dr. French stated,

She has a lot of questions about how her shoulder instability is related to her brachial plexus. I described the brachial plexus to her in some detail and demonstrated how a shoulder that is unstable contributes to chronic stress and traction to the brachial plexus. (E3, p. 8)

On examination, plaintiff had multi-directional instability of the right shoulder. Plaintiff was exquisitely tender over her supra- and infraclavicular brachial plexus. Dr. French's impression was improving anterior/inferior dislocation of her right shoulder with traction brachial plexus injury. Additional physical therapy was ordered together with medication. Plaintiff was not to work for another 6 weeks. Dr. French then McConnell taped the right shoulder (E3, p. 8). On April 17, 2002, Dr. French wrote that, "all of her nerve symptoms have resolved. She now has basically pure shoulder pain. It is significantly relieved by McConnell taping." On examination, plaintiff's shoulder motion was very guarded and she was "minimally tender over her supraclavicular brachial plexus and exquisitely tender over her infraclavicular brachial plexus. Again, that is consistent with recovering brachial plexus stretching injury." Dr. French recommended that plaintiff continue physical therapy. Dr. French also expressed to plaintiff that if the shoulder did not feel much better, arthroscopy and repair of the shoulder would be recommended (E3, p. 9).

On May 15, 2002, plaintiff returned to Dr. French after a heavy traction injury in January of this year, while working on her truck. It was noted that,

The arm numbness is mostly resolved. At this point, she has continued to have shoulder pain. As she tries to do more, the shoulder has become progressively sorer. She has a grade 3 anterior instability in the right shoulder. She still has paraesthesias that feel like goose bumps in her arm. Sometimes, when she overuses the arm. The only thing that has really been consistently helpful is the McConnell taping, and the only time it is pain-free is when she is taped. (E3, p. 10)

Dr. French recommended that plaintiff undergo an exam under anesthesia and reconstruction of the right shoulder.

On July 23, 2002, plaintiff underwent surgery for grade 3 anterior and posterior instability; grade 2 inferior, grade 3 superior labrum anterior and posterior (SLAP); and partial rotator cuff tear (E1, p. 15).

Plaintiff returned to Dr. French on July 31, 2002. Dr. French stated that plaintiff was doing well, but her hand was intermittently numb. He further stated that plaintiff occasionally gets shocks down her forearm. Plaintiff had a fairly significant brachial plexus injury with this shoulder injury. Plaintiff was instructed to return in 3 weeks and at that time, she would start physical therapy (E3, p. 11).

On August 21, 2002, plaintiff was doing well, but still had a fair amount of ache in her forearm. Dr. French indicated that he thought the brachial plexus was beginning to resolve and that plaintiff was able to start physical therapy. On October 4, 2002, plaintiff was doing well, but had some spasming and cramping in her hand. Dr. French's opinion was that the plaintiff was making good progress and explained that the cramping was due to reinnervation. Dr. French recommended that physical therapy should continue for 6 more weeks (E3, p. 15).

On November 13, 2002, plaintiff was seen by Dr. French for a 3 1/2 months post-right shoulder reconstruction. Dr. French stated that plaintiff's right shoulder was doing much better, but she still had some scalene spasms and moderate tenderness along her brachial plexus. Dr. French anticipated that this would continue to heal (E3, p. 17).

On December 11, 2002, plaintiff was seen by Dr. French for a 4 1/2 months post-right shoulder reconstruction. Dr. French stated that plaintiff had a full range of motion and was having no pain over her supra- or infraclavicular brachial plexus. Dr. French further stated that plaintiff had a negative Tinel's at the wrist and negative Tinel's at the elbow. Plaintiff expressed to Dr. French that she wanted to return to work driving a truck. Dr. French instructed plaintiff to continue with the rest of her physical therapy and then progress to home therapy. Plaintiff was further instructed to return in one year (E3, p. 19).

On January 10, 2003, plaintiff returned to work for the defendant as a truck driver. Plaintiff testified that she worked until the end of April, when the pain in her right hand and chest worsened and she felt her condition was the same as it was in 2002. On April 30, 2003, plaintiff returned to Dr. French who noted that her brachial plexus symptoms flared up (E3, p. 22). On exam, plaintiff was acutely tender over her supra- and infraclavicular brachial plexus and all the way down to the axilla. Plaintiff had a positive Tinel's at the elbow and at the wrist. Dr. French's impression was that plaintiff was having a significant flare of her right brachial plexus injury. McConnell taping was done for the shoulder and medication was ordered. Dr. French recommended that the plaintiff remain off work for one month.

In a letter dated April 30, 2003, to Ms. Marcia Thomas the worker's compensation claims examiner for Drivers Management, LLC., Dr. French wrote,

Patient was seen on August 30, 2003. She had a significant flare in her brachial plexus symptoms, which were part of her original injuries to the right shoulder. This is probably a temporary setback. Patient needs to do some physical therapy and be off work for a few weeks, and restart her nerve medication. I am expecting this to calm down entirely.” (E3, p. 21)

On May 23, 2003, plaintiff was seen by Dr. French for a follow up on her right brachial plexus flare. Dr. French stated that plaintiff was still exquisitely tender over her brachial plexus and was to remain off work (E3, p. 26).

On June 18, 2003, plaintiff was seen by Dr. French for an 11 month post right shoulder reconstruction. Dr. French felt that the plaintiff’s problem was a “normal healing flare.” (E3, p. 29)

On July 28, 2003, plaintiff was seen by Dr. French for her 1-year postoperative follow-up exam. At this time, plaintiff continued to have burning and hypersensitivity down the arm. Dr. French felt that her hypersensitivity was reasonably normal and somewhat related to her scalene reflex. Dr. French recommended injecting Botox into her right scalenes to see if this would alleviate some of the burning, hypersensitivity and muscle spasming by blocking the reflexes. Plaintiff was off work for at least one month (E3, p. 31).

On August 5, 2003, plaintiff was examined by Dr. Douglas Bald, an orthopedic surgeon at WMCI Prime Evaluations (E12, pp. 12-19). According to Dr. Bald’s notes, the plaintiff’s chief complaint was right shoulder and upper arm pain and paresthesias of the right arm. Dr. Bald took a history of the incident and stated (summarized and restated),

That plaintiff was originally seen and treated by Dr. Johnson. Plaintiff was then referred to Dr. French who treated and performed surgery on the plaintiff’s right shoulder. Plaintiff did return to work for approximately one month when she began to notice progressive increase in pain and complained of the right shoulder and upper arm once again. Symptoms got worse and plaintiff returned to Dr. French. Dr. French took plaintiff off work for a “flare up” of the brachial plexus injury. Plaintiff had been to physical therapy and was now on home exercise therapy. Plaintiff was on medication and continued to see Dr. French, who suggested a series of Botox injections.

In an examination of the right shoulder performed by Dr. Bald, he thought plaintiff exhibited pain behaviors. The Phalen’s test was negative bilaterally. The Tinel’s testing was positive over the median nerve at the right wrist, the ulnar nerve at the right elbow and the radial nerve in the mid and distal forearm. The Tinel’s testing was reported to be positive to percussion in the supraclavicular area, but also reported to be positive to percussion over the top of the acromion and the anterior upper arm. Dr. Bald thought “these are noted to be clearly non-anatomical findings.” Dr. Bald’s impressions were:

1. Multidirectional instability of the right shoulder – date of injury January 15, 2002; status post arthroscopy and capsular reconstruction of the right shoulder.
2. Degenerative disc disease of the cervical spine, pre-existing.
3. Right upper extremity paresthesias – possibly related to a brachial plexus stretch injury.

Dr. Bald stated that it is in his opinion that plaintiff injured her right shoulder in work activities on January 15, 2002. It is also his opinion that the plaintiff had excellent results from the right shoulder surgery, but still had complaints of pain as well as paresthesias in the right upper extremity that were difficult to explain. Dr. Bald recommended a referral to a neurologist so an electrical testing could be performed in the right upper extremity. Dr. Bald did not feel that the plaintiff was a candidate for further surgical management (shoulder surgery) and would strongly recommend against exploration of the brachial plexus. Dr. Bald felt that any further surgery would only make plaintiff's symptomatology worse. Dr. Bald stated that in his expert medical opinion, the plaintiff would not benefit from Botox injections as her symptoms were too diffuse and overwhelming to benefit from this type of treatment (E12, p. 18).

On October 14, 2003, plaintiff was examined by Dr. Merle Janes, a physiatrist at Valley Rehab and EMG (E5, pp. 11-13). Prior to seeing Dr. Janes, plaintiff prepared a patient information sheet. In the information sheet, plaintiff complained of right shoulder and arm pain. Dr. Janes took a history of the injury and treatment that plaintiff has received. Dr. Janes conducted a physical exam and performed a nerve conduction and EMG/NCV test. Dr. Janes wrote,

Nerve conduction and EMG/NCV exam detailed report attached. Data suggest CTS and ulnar focal neuropathy at the elbow. Brachioplexopathy is suspected based on physical exam but electrical tests normally used to test this hypothesis could not be employed due to them causing increased local pain that was too strong to continue. However, the EMG exam showed that there does not appear to be active muscle fibre denervation at this time, which is a good prognostic indicator.

Dr. Janes' clinical diagnosis was:

- [1] Industrial injury from having forcefully hit her shoulder against immotile object.
- [2] 847.0 Cervical sprain/strain from #1.
- [3] 847.1 Thoracic sprain/strain from #1.
- [4] 716.11 Shoulder joint sprain from #1.
- [5] 353.0 TOS/brachioplexopathy from #1, 4.
- [6] Chronic pain from all above.
- [7] Chronic sleep disturbance from #6. (E5, p. 13)

Dr. Janes stated that the plaintiff was unable to safely and dependably return to the duties of an over-road truck driver. Dr. Janes further stated that plaintiff was not stable and/or at maximum medical recovery. Dr. Janes gave plaintiff medication which did not work. On November 4, 2003, Dr. Janes injected plaintiff's right shoulder and scapula (E5, p. 25).

On November 3, 2003, plaintiff returned to Dr. French who had Dr. Janes' report. On examination, Dr. French stated that plaintiff continued to have significant irritability over the right brachial plexus as well as the ulnar nerve at the elbow and wrist. Dr. French felt that plaintiff got a significant amount of relief from the Marcaine blockade of her right middle scalene. Dr. French thinks that Botox had a good chance of correcting her nerve symptoms as a carpal tunnel release and a cubital tunnel release. Dr. French renewed his recommendation for Botox injections which he wanted to try before carpal tunnel release (E3, p. 36).

Dr. Janes' report was also given to Dr. Bald. In a letter to Debby J. Marcus, R.N., for Werner Enterprises dated November 11, 2003, Dr. Bald wrote,

I have reviewed Dr. James' report as well as the actual numbers concerning the electrical studies, and what is apparent is that Ms. Finley has absolutely no evidence to suggest brachial plexopathy or cervical radiculopathy. The only abnormality which is felt to be of no clinical significance is minor median sensory latency consistent with electrical evidence of a mild carpal tunnel syndrome. In my opinion the claimant clinically does not clinically have a carpal tunnel syndrome nor would that in any way explain her relatively bizarre symptomatology. . . . Having reviewed this study, in my opinion, this effectively eliminates the possibility of a brachial plexopathy as the source of Ms. Finley's symptomatology. Given that information, she appears to be now medically stable and stationary as no further medical treatment is likely to result in any improvement in her symptoms. (E12, p. 6)

Dr. Bald's opinion was that he didn't feel plaintiff's carpal tunnel was caused by the injury of January 15, 2002, and was of no clinical significance. On November 18, 2003, a supplemental report was prepared by Dr. Bald (E12, pp. 10-11). In the report, Dr. Bald stated that plaintiff did not have any physical limitations other than some restrictions to heavy repetitive overhead use of her right shoulder from the work related injury of January 15, 2002. Dr. Bald believed that plaintiff had a 4 percent impairment or loss of use of the right upper extremity.

Dr. Bald's report of November 11, 2003, was sent to Dr. French, who, in turn, wrote a letter to Debbie Marcus of Werner Enterprises, dated December 3, 2003 (E3, p. 40). In this letter, Dr. French indicated that he had been seeking treatment for the plaintiff's peripheral nerve injuries for several months. He further indicated that when the plaintiff first presented to him, she had diffuse numbness, aching down the arm, and exquisite tenderness over her supraclavicular and infraclavicular brachial plexus. Dr. French stated that plaintiff had a significant sensory examination and had an absolutely unstable shoulder. Dr. French noted that plaintiff had returned to work, but

was unable to continue her job due to the significant nerve symptoms that persisted and had to leave her employment. Dr. French wrote,

We disagree entirely with this report (Dr. Bald's report). We have numerous clinical examinations. We have a strong diagnostic examination which indicates this patient's cubital tunnel and carpal tunnel syndrome specifically related to this patient's injury in that she was in a fairly labor-intensive job prior to her injury and had no symptoms but immediately after her injury had significant symptoms. (E3, p. 41)

On December 10, 2003, plaintiff returned to Dr. French for her right shoulder and left shoulder (E3, p. 43). As to the left shoulder, plaintiff did not complain of pain in the left shoulder at the time of the right shoulder injury. Dr. French noted that in the plaintiff's examination under anesthesia on July 23, 2002, she did have interior laxity of her left shoulder. He further noted that the plaintiff, two weeks ago, while putting her shirt on, felt and heard a loud pop in her shoulder. Since that time, plaintiff stated that she had considerable pain and was hardly able to sleep. Under discussion, Dr. French wrote that plaintiff did have an examination under anesthesia which demonstrated her instability and her shoulder was McConnell-taped.

Dr. French continued to treat plaintiff's right and left shoulder and the right brachial plexus injury. On May 24, 2004, Dr. French recommended a right carpal tunnel release and a right medial epicondylectomy. Upon examination of the plaintiff's left shoulder (while under anesthesia), Dr. French recommended that, "If her left shoulder is still able to be dislocated or nearly able to be dislocated on the examination at the time of her right forearm surgery, I would recommend letting her get over the right arm surgery and then reconstructing her left shoulder (E3, p. 53).

In a letter dated June 11, 2004, to Mark Grell at Harris Law Offices, P.C., Dr. French wrote,

We recommend a right medial epicondylectomy and open carpal tunnel release. There is at least a 50/50 chance of improving her brachial plexus symptoms with this treatment. Her left shoulder is still unstable and as it is becoming more symptomatic, we would recommend that when she has her right elbow and hand surgery, that she undergoes a left shoulder examination under anesthesia and possible reconstruction. (E3, p. 55).

It was Dr. French's opinion, at that time, that the plaintiff had not finished treatment and, therefore, no impairment rating could be given. Dr. French stated that the plaintiff was not able to return to her previous employment as a truck driver. It was his opinion that the injuries to plaintiff's right brachial plexus elbow, wrist, and left shoulder, were a "more-probable-than-not basis" related to her injuries sustained on the job dated January 15, 2002 (E3, p. 55).

In the Supplemental Report of July 27, 2004, Dr. Bald noted that Dr. James' studies revealed no evidence of brachial plexopathy or radiculopathy of any kind. He further noted that a carpal

tunnel compression or an ulnar nerve compression would not explain the entirety of plaintiff's symptomatology. Dr. Bald felt that there was not an objective basis for the plaintiff's persistent right upper extremity paresthesias. He stated that the plaintiff sustained an injury to her right shoulder which had been completed with excellent surgical results. Plaintiff never did complain to Dr. Bald about a left shoulder injury and in his examination of plaintiff's left shoulder, according to him, appeared normal. Dr. Bald stated that there was not a relationship between plaintiff's current left shoulder condition and the work injury in question of January 15, 2002. Dr. Bald disagreed with Dr. French that further surgical treatment was reasonable and/or necessary related to the paresthesias. (E12, pp. 2-4)

The first question was did plaintiff sustain an injury on January 15, 2002. The evidence is that on January 15, 2002, plaintiff was in or near New Jersey and not in Missouri. The evidence further indicates that on or about January 18, 2002, plaintiff was in the state of Missouri either in North Joplin or Lamar, or 1 hour and 5 minutes away from Lamar, Missouri. Plaintiff was in a snow storm and it was icy. Plaintiff reported on January 18, 2002, that she was trying to move her tandems, but everything was frozen. Plaintiff did reply back to the dispatcher that she thought she had it now. Medical records are clear that the injury happened in Missouri and was reported to defendant that it did happen in Missouri. Plaintiff's testimony is consistent with the fact that there was a snow storm, it was icy, it was cold, and something happened in Missouri. Whether or not it happened on January 15, 2002, or January 18, 2002, is irrelevant. The issue tried in this case is whether or not plaintiff injured her arm pulling the pin. I find that the plaintiff injured her right arm on January 18, 2002, when she was pulling a pin to move the tandem axles on her trailer. Technically, the date of the accident is January 29, 2002, the date she stopped work and sought medical care.

I further find that as a result of the incident on January 18, 2002, the plaintiff did not injure her left arm. While the plaintiff was found to have an unstable left shoulder during the surgery of July 23, 2002, there were never any complaints of left shoulder pain until after she put on her blouse, at which time the left shoulder injury occurred. There is an argument that the problems with the left shoulder are due to the plaintiff compensating because of the injury to the right shoulder. Once the right shoulder and the right brachial plexus were repaired, the left shoulder should, hopefully, get better.

Both Dr. Johnson and Dr. French diagnosed the brachial plexus injury early on. Dr. Johnson diagnosed it as early as February 19, 2002, and Dr. French diagnosed it in his first examination of plaintiff on February 19, 2002. There was an injury of the brachial plexus which needed treatment. The injury to the brachial plexus was the result of the incident on January 18, 2002.

I realize Dr. Bald believes otherwise, but Dr. Janes' report shows that he could not conduct sufficient testing and Dr. French also noted that it was difficult to determine the nature and extent of the brachial plexus injury. Dr. French wanted to treat the brachial plexus injury with Botox which was denied, which I feel, was a mistake. Dr. French is authorized and defendant is ordered to pay for Botox injections. Further treatment of the brachial plexus injury depends on the result of the Botox

injections.

Plaintiff's average weekly wage is \$709.54.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that:

1. On January 18, 2002, plaintiff injured her right shoulder, right arm, and right brachial plexus. Plaintiff is entitled to temporary benefits from January 29, 2002, through January 9, 2003. Plaintiff is entitled to \$473.02 per week for temporary benefits. In addition, plaintiff is entitled to temporary benefits beginning April 30, 2003, to date of trial and for so long in the future as plaintiff may be entitled to temporary total benefits.
2. Plaintiff has not yet reached maximum medical recovery because she is entitled to additional medical care from Dr. French for the right shoulder, arm, and brachial plexus injury. Defendant is ordered to pay for plaintiff's future medical care all as required by Section 48-120.
3. Permanent benefits cannot be awarded at this time.
4. The defendant is ordered to pay the medical bills in Exhibit 11A and Exhibit 11B pursuant to the fee schedule of the Nebraska Workers' Compensation Court.
5. Plaintiff will not be able to return to her position as a truck driver. It is appropriate that vocational rehabilitation services begin now so that when plaintiff reaches maximum medical recovery, a plan will have been prepared in which plaintiff can immediately begin to participate in. In the alternative, plaintiff could possibly participate in vocational rehabilitation services prior to reaching maximum medical recovery which would be for the benefit of all involved.
6. The defendant is given credit for payments made to plaintiff as shown in Exhibit 15.
7. There are no penalties or attorney's fees due.

Dated at Lincoln, Lancaster County, Nebraska, on this 27th day of January, 2005.

NEBRASKA WORKERS' COMPENSATION COURT



J. Michael Fitzgerald
COPY

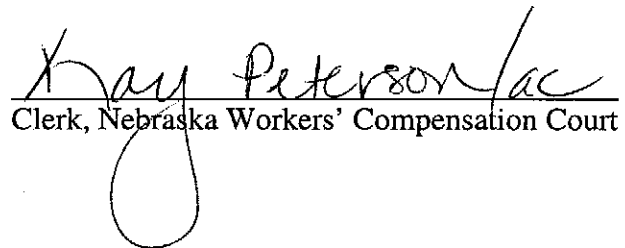
JUDGE

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 27th day of January, 2005, addressed as shown below, to the following:

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Clerk, Nebraska Workers' Compensation Court