

IN THE NEBRASKA WORKERS' COMPENSATION COURT

THOMAS WEBSTER,)
)
 Plaintiff,)
)
 vs.)
)
 DRIVERS MANAGEMENT, INC.,)
)
 Defendant.)

DOC: 205 NO: 1202

AWARD

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JUN 05 2007

**NEBRASKA WORKERS'
COMPENSATION COURT**

APPEARANCES:

Plaintiff: Mark P. Grell
 Attorney at Law
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 P. O. Box 30886
 Lincoln, NE 68503-0886

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

This matter comes on for trial this 21st day of December, 2006, in Papillion, Nebraska. A further hearing was held on February 15, 2007. At the hearing on February 15, 2007, Exhibit 39 was received into evidence.

Prior to November 7, 2002, plaintiff was a non-insulin dependent Type 2 diabetic. Plaintiff had neuropathy of both feet and hands and took Darvocet for the neuropathy pain.

On November 7, 2002, plaintiff was employed by defendant as a truck driver. Plaintiff was opening the rear door of the trailer when a loaded pallet fell on him striking his head and knocking him to the ground. Plaintiff was dazed. Plaintiff had pain in his head and his neck and reported the incident to his dispatcher and requested a route home. Plaintiff had some short trips and was finally able to get home to Largo, Florida, on November 18, 2002. Plaintiff went to the emergency room at Largo Medical Center with the history that he drives a semi, was hit in the head with a pallet on November 7, has blurred vision, and pain to the neck (E1, p. 2). The CT of the head was negative.

The diagnosis was cervical strain and mild concussion. Plaintiff was to do neck exercises, attend physical therapy, take medication, and make an appointment to see a physician or spinal surgeon (E1, pp. 2 and 11). Plaintiff was taken off work.

On November 22, 2002, plaintiff returned to Largo Medical Rehab Center (E1, p. 16) with constant neck pain and headache. Plaintiff was treated conservatively and attended physical therapy at Bray-Maness Physical Therapy, Inc. Dr. Kevin Burns ordered an MRI which showed a disc herniation with probable nerve impingement. Plaintiff was referred to Dr. Victoria Neave at The Johnson Neurological Clinic, Inc. (E1, p. 33).

Dr. Neave examined plaintiff on January 15, 2003, (E5, pp. 7-10). Dr. Neave found the MRI to be of poor quality. Dr. Neave noted, "There is a little left paracentral disc bulge at C4-5 that does not compress the spinal cord. It could compress the left C5 nerve root but he has no clinical symptoms of this." (E5, p. 7). Dr. Neave's impression was neck pain, headaches, and blurred vision following neck and head injury on the job. Dr. Neave did not see a surgical lesion. Conservative treatment was ordered. Plaintiff was referred to Dr. Eric Moser at High Point Neurological Associates.

Plaintiff was examined by Dr. Moser on February 6, 2003, for complaints of headaches and neck pain. Dr. Moser examined plaintiff and his impression was "Sixty-two-year-old white male status post head injury. Number one complaint is headaches and neck pain, agree with Dr. Vicky Neave's evaluation, are cervicogenic in nature." (E2, p. 3). There was a discussion about facet joint, medial branch blocks and possible neurotomy under radiofrequency or chemical. First Neurontin would be increased. There were also complaints of loss of memory which could be related to head injury or early Alzheimer's. Plaintiff had neuropathy and possible obstructive sleep apnea (E2, pp. 1-4).

On March 19, 2003, Dr. Moser had facet joint injections at C2-3, 3-4, and 4-5 (E2, p. 8). On April 23, 2003, Dr. Moser recommended a sleep apnea study (E2, p. 13). An MRI of the brain on March 29, 2003, showed "Slightly abnormal MRI . . . showing some mild to moderate cerebral atrophy and some minimal small vessel occlusive disease in the periventricular white matter." (E2, p. 15). On June 6, 2003, Dr. Moser performed medial branch blocks at bilateral C2-3 and C3-4 as well as facet joint injections (E2, p. 16).

On July 25, 2003, Dr. Moser started plaintiff on Methadone (E2, p. 22).

On September 8, 2003, Dr. Moser wrote that the MRI showed a small leftward disc protrusion at C4-5 and arthritic changes at C5-6 as well as misalignment (E2, p. 23). The plaintiff had received a short amount of pain relief from the medial branch facet joint injections. Plaintiff had complained of visual problems with blurry vision. An MRI did not show any lesion to explain this. Plaintiff had an ophthalmological evaluation at Southeastern Eye Center which showed an

impression of blurred vision of the left eye vitreous, opacity of both eyes, and nuclear sclerosis of both eyes. Dr. Moser believed this was the cause of the blurry vision. Plaintiff was still having pain in his cervical spine but did not wish to have radiofrequency ablation. Plaintiff was placed on Methadone twice a day which was successful in alleviating most of his pain. Dr. Moser believed plaintiff was at maximum medical benefit. Dr. Moser wrote,

As far as restrictions for normal labor, I would place none on the patient at this time. As far as restrictions driving, this will be evaluated by a company physician. If this is unable to be given, we can put him through the driving evaluation clinic, either at Moses Cone or at High Point Regional Hospital. For his visual complaints, we will refer those to the company physician (E2, p. 23).

Plaintiff received additional treatment from Dr. Moser for chronic neck pain including physical therapy in December of 2002. Dr. Moser believes plaintiff has a 7 percent disability for chronic neck pain (E2, p. 28).

Plaintiff had a driving evaluation at Driver Rehabilitation Services, P.A. (E8). This evaluation took place on November 28, 2003. Plaintiff drove the school's 1999 Chrysler Town and Country minivan. Plaintiff did not drive a truck or a semi-trailer truck. The plaintiff demonstrated safe and independent driving skills but complained of visual processing. The tests stated, under the heading Recommendations,

1. Recommend that Mr. Webster be seen by a neuro-optometric rehabilitation professional to assess for visual processing dysfunction (Post Trauma Vision Syndrome), lateral and vertical phoria and fusion problems. Night vision should be assessed as well (E8, pp. 7-8).

It was recommended that plaintiff see Dr. Barry Kavanaugh, Jr., OD, FAAO. Under Recommendations, it was also noted that plaintiff demonstrated the skills to continue independent driving for personal reasons. It was noted that until plaintiff is cleared by a visual specialist, he should avoid night driving due to poor scores in this area. Plaintiff would need clearance from his physician prior to returning to work as a truck driver. The therapist was concerned about visual processing difficulties that may interfere with concentration for long distance driving. Plaintiff would also need to be cleared regarding medications. Plaintiff was on Methadone. The Department of Transportation would not issue a CDL because he was on prescription for Methadone.

On December 15, 2003; January 2, 2004; January 7, 2004; and January 13, 2004; plaintiff was examined by Dr. Kavanaugh. On January 15, 2004, Dr. Kavanaugh wrote that plaintiff had blurred vision in the left eye consistent with numerous tests (E9, pp. 17-21). Dr. Kavanaugh also wrote,

Mr. Webster's visual skills (the ability to maintain fusion with efficiency and to be able to process information visually) are most likely deficient secondary to his head injury. His visual skills are very similar to those included in Post-trauma Vision Syndrome (i.e.: convergence insufficiency, accommodative insufficiency, and ocular-motor dysfunction). His ability to maintain fusion is very brittle, and extended visual activities currently stress this system so much it actually goes into "shut-down mode"—intermittent central suppression of the OS. This is when he notices a "blurry spot" or "black spot" in the center of his OS (E9, p. 20).

Dr. Kavanaugh recommended Neuro-Optometric Vision Rehabilitation (E9, p. 20).

Plaintiff attended 14 rehabilitation sessions (E9, pp. 24-60). Plaintiff's last rehabilitation session was on July 14, 2004. Plaintiff stopped the Neuro-Optometric Rehabilitation because he was moving to Florida. On July 28, 2004, Dr. Kavanaugh found plaintiff to have a 20 percent loss of use of the left eye (E9, pp. 66-68). Dr. Kavanaugh also wrote, on July 28, 2004, that plaintiff's binocular visual skills were in the normal range and that he had good vergence ranges, which gave him the ability to maintain good fusion. There is some loss of acuity in the left eye and a reduced Stereopsis which indicated that he had some residual binocular dysfunction, however it appeared to be well tolerated. Dr. Kavanaugh also wrote,

Mr. Webster has some medical conditions (neuropathy, chronic pain, cervical problems, NIDDM) that can all have a negative impact on his visual function. When these problems are not under good control he can expect to have at least temporary recurrence of his original visual dysfunction and symptoms. The medications have the potential to have a negative impact on his vision as well. Pain medications and muscle relaxers often decrease binocular coordination (E9, p. 68).

On November 17, 2005, Dr. Kavanaugh wrote that Mr. Webster was not capable of commercial driving. Dr. Kavanaugh also wrote that the Methadone would cause his fusion to break down with a return of diplopia, eye strain, visual confusion, and intermittent central scotoma in his left eye. Dr. Kavanaugh believes the visual problems are consistent with the type of head injury the plaintiff sustained (E9, pp. 69-70).

Plaintiff obtained a cab driver's license and attempted to drive a cab but was unable to continue driving the cab because of neck pain when he turned his head and also vision problems.

On July 31, 2006, plaintiff was examined by Dr. Raj Kumar (E16). Dr. Kumar is an orthopedic surgeon. Dr. Kumar stated that the accident and incident on November 7, 2002, aggravated plaintiff's preexisting osteoarthritis of the cervical spine. Plaintiff has restrictions of cervical motion and would have difficulty moving his neck side to side. He will not be able to do

truck driving or driving a taxi because of limitations of neck motion as well as pain and tenderness in the neck. Dr. Kumar thought plaintiff should take only Darvocet and that he should not take Methadone.

Defendant retained Dr. James Rush, a neuro-ophthalmologist, to examine plaintiff. Dr. Rush examined plaintiff on October 31, 2006, and prepared a report and testified via deposition. Objections were made to certain questions in Dr. Rush's deposition. All those objections are overruled. The deposition is marked Exhibit 19. Dr. Rush's report is marked Exhibit 20. Dr. Rush found that the treatment by Dr. Kavanaugh was appropriate and that plaintiff has no impairment of left eye.

Dr. D.M. Gammel examined plaintiff on January 26, 2006, and prepared a report (E21). Dr. Gammel reviewed medical records and examined plaintiff. Dr. Gammel gave an opinion that plaintiff sustained a permanent aggravation of a preexisting degenerative cervical spine condition. Dr. Gammel believes that plaintiff's visual difficulties are unrelated to the work injury of November 7, 2002. Dr. Gammel gave an opinion that plaintiff reached maximum medical recovery on September 8, 2003, has no need for permanent work restrictions, has no restrictions from the diabetic neuropathy, and needs no further medical treatment. Plaintiff cannot drive a truck or a taxi because he takes narcotic medication. If plaintiff did not take the narcotic medication he would be capable of driving a truck or a taxi.

On November 7, 2002, plaintiff injured his neck and suffered a head injury. Dr. Moser has prescribed Methadone for the neck pain which is ongoing and as a result plaintiff is unable to return to work as a truck driver and/or a taxi driver.

Plaintiff's primary work experience is as a truck driver. Bill Brown, an Independent Case Manager, was retained to provide vocational rehabilitation services in Florida. Mr. Brown met with plaintiff and reviewed medical records. Mr. Brown also conducted a labor market survey in which he found positions at Sears at \$9 per hour answering customer's inquiries either by phone or in person at the customer service counter, handling incoming customer phone calls at G.E. Consumer Finance Call Center, working for Washington Inventory Services, and various security positions. There is also possibility of a Special Services Associate at Home Depot (E14, pp. 16-18). The plaintiff did not feel that he could return to work and made no attempt to find work.

Plaintiff has limitation and range of motion of his neck and is unable to drive because he would have to look side to side and turn his neck which is painful and also because plaintiff takes Methadone. A commercial driving position is out of the question. The question then becomes what else plaintiff can do. Plaintiff has no computer skills. Plaintiff also has preexisting diabetic neuropathy, which when combined with his neck limitations, limits plaintiff to sedentary type occupations. The diabetic neuropathy affects both plaintiff's hands and feet and security type jobs would be inappropriate for one with a diabetic neuropathy in his feet. While I am disappointed that

plaintiff did not attempt to seek employment other than return to work at something he knew, the positions available are either outside of his physical ability and/or his experiences in the labor market. Considering plaintiff's age, education, experience, and physical impairments, plaintiff is totally disabled.

Plaintiff reached maximum medical recovery on July 28, 2004, when he was released by Dr. Kavanaugh.

Plaintiff is entitled to temporary total benefits from November 18, 2002, to July 28, 2004, and beginning July 29, 2004, permanent total benefits. Plaintiff's average weekly wage is \$620 per week which entitles plaintiff to \$413.33 per week for both temporary and permanent benefits.

All medical bills have been paid to date. Plaintiff is entitled to future medical care, all as required by § 48-120.

Further vocational rehabilitation services are unnecessary. There is no claim for penalties or attorney's fees.

IT IS THEREFORE ORDERED that:

1. Plaintiff have and recover from defendant the temporary and permanent benefits set forth above.
2. Defendant is ordered to pay plaintiff's future medical care, all as required by § 48-120.
3. Defendant is entitled to credit for payments made to plaintiff.

Dated at Lincoln, Lancaster County, Nebraska, on this 5th day of June, 2007.

NEBRASKA WORKERS' COMPENSATION COURT



J. Michael Fitzgerald
COPY

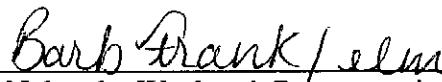
JUDGE

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 5th day of June, 2007, addressed as shown below, to the following:

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Clerk, Nebraska Workers' Compensation Court