

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F114351

RICHARD PHELPS

CLAIMANT

USA TRUCK, INC.  
SELF INSURED

RESPONDENT

OPINION FILED NOVEMBER 17, 2003

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

Claimant represented by ROBERT BLATT, Attorney, Fort Smith, Arkansas.

Respondents represented by J. RODNEY MILLS, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held on September 4, 2003, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on May 21, 2003. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

The following stipulations were submitted by the parties and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On December 20, 2001, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his neck on December 21, 2001.

4. The claimant is entitled to a weekly compensation rate of \$410.00 for temporary total disability and \$308.00 for permanent partial disability.

5. The respondents have accepted a 9 percent permanent partial impairment.

6. All medical expenses have been paid.

By agreement of the parties the issues to litigate are limited to the following:

1. The claimant's entitlement to additional medical treatment.  
2. The date of the claimant's healing period.  
3. Is the respondent entitled to a credit for over payment of TTD?

4. What is the correct permanent impairment rating for this claimant?

5. Is the claimant entitled to wage loss over his impairment rating?

6. Attorney's fees.

In regard to the foregoing issues the claimant contends that he is entitled to additional permanent disability over and above the anatomical rating, a higher permanent impairment rating and attorney's fees.

In regard to the foregoing issues the respondent contends that all benefits due and owing the claimant have been paid, or are being paid. The claimant is not permanently and totally disabled as a result of any compensable event. The claimant is not entitled to additional permanent disability benefits over and above his

anatomical impairment rating. No compensable event is the major cause of any disability assessed to the claimant over and above that already accepted by the respondent.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted medical information marked Claimant's Exhibit No. 1, pages from the A.M.A. Guide marked Claimant's Exhibit No. 2 and Claimant's Exhibit No. 3. The respondents submitted non-medical information marked Respondents' Exhibit No. 1 and the parties submitted documentary evidence marked Joint Exhibit No. 1. The respondents objected to Claimant's Exhibits No. 1 and No. 2, their objection was overruled and these documents were admitted as evidence over the respondents' objection.

The record was held open for the possibility of the respondents taking Dr. David Miller's deposition. By letter dated October 20, 2003, from the respondent's attorney, it was set forth that the respondents no longer wish to take Dr. Miller's deposition, therefore, the record could be closed.

#### DISCUSSION

The claimant testified that he was forty years old, had a GED and had attended some college. The claimant testified that he began working for the respondent on July 14, 2001, as an over the road truck driver and prior to that had been driving a truck for Knight Trucking for a little over a year. The claimant testified that he also had worked in a transportation company in their office in the licencing and titles department for approximately three

years. The claimant testified that before that he had worked as a monitor engineer/production manager for a music company traveling around, setting up the stage, lighting and equipment for concerts. The claimant testified that he had this job for a period of eighteen years. The claimant testified that his job in the music industry was very physical, requiring lots of lifting, bending, stooping, twisting and carrying.

The claimant testified and it has been stipulated that he sustained a compensable injury while working for the respondent on December 21, 2001. The claimant testified that after his injury he began receiving medical treatment in the Fort Smith area on December 26, 2001. The claimant testified that as a result of his compensable injury Dr. Armstrong did a cervical fusion on his neck. The claimant agreed that after he recuperated from his surgery, he returned to his home in South Bend, Indiana, and began treatment under Dr. Mitchell Gropper. The claimant agreed that Dr. Gropper then referred him to Dr. David C. Miller who is a pain specialist and he received physical therapy and treatment from Dr. Miller. The claimant stated that he last saw Dr. Miller on February 17, 2003, and that this doctor had recommended some psychological cognitive behavior treatments and stress management which the respondent has denied. The claimant testified that subsequent to February 17, 2003, he has not been authorized to receive treatment from Dr. Miller but has, on his own, continued to be treated by Dr. Miller. The claimant testified that it was also his understanding that Dr. Miller has recommended a nerve deadening process which

could only be done a year and a half after his surgery which would place this procedure being undertaken around August 2003. The claimant testified that he saw Dr. Gropper in March 2003 at which time the doctor gave him an impairment rating as well as permanent restrictions. The claimant testified that based on Dr. Gropper's restrictions, he would no longer be able to do the job required by the respondent.

The claimant agreed that his healing period had ended at least as of the date of this hearing, September 4, 2003. The claimant testified that Dr. Armstrong authored a report on April 18, 2002, which was after he had returned to his home in Indiana and before he had returned to work for the respondent and without examining him. The claimant stated that while he was in Indiana he underwent a course of physical therapy and work hardening as recommended by Dr. Armstrong. The claimant agreed that he completed his physical therapy program plan on April 17, 2002, after which time he returned to work for the respondent as a long haul truck driver, driving cross country. The claimant testified that as a result of his return to work, the pain in his neck started getting worse as well as the pain in his right shoulder. The claimant stated that he began having migraine headaches so severe that he would have to pull over and throw up. The claimant testified that he began having spasms in his neck going up into his face, noting that it was hard to drive because it was so painful. The claimant testified that he asked to be seen by a physician in his home area and was sent to Dr. Gropper on July 10, 2002. The claimant

testified that as a result of the prescriptions given to him by Dr. Gropper as well as the physical therapy program set out for him, the respondent made the decision that he was not able to drive and had his truck picked up. The claimant was asked, "you're telling this Court that it was the respondent's decision not to allow you to continue to work at that time?" The claimant responded, "yes, sir." The claimant testified that the respondents began paying him temporary total disability at that time. The claimant testified that he was referred to Dr. Miller for physical therapy and even though further treatment by Dr. Miller has now been denied, the respondents have paid temporary total disability to this claimant up until August 30, 2003. The claimant testified that he tendered his resignation to the respondent at their request on August 13, 2002. The claimant testified that due to his physical therapy, the medications he was taking as well as his physical problems, he knew he could not continue to work for the respondent.

The claimant was asked to describe what his current symptoms are and the claimant responded that he is still having migraine headaches, lots of neck pain and pain down into his shoulder. The claimant testified that he also has a hard time sitting for long periods of time without having to get up and walk around and even needing to find a place to rest sometimes. The claimant testified that prior to his December 2001 injury, he did not have any restrictions and did not even have a regular treating physician. The claimant testified that prior to his December 2001 injury, he could do any kind of lifting, bending or stooping as needed.

The claimant testified that he is currently enrolled in a two-year computer course offered at Ivy Tech in South Bend, Indiana. The claimant testified that Indiana Vocational Rehabilitation is helping him with this program and he is currently in computer-aided design and computer aided manufacturing to get a two-year degree. The claimant testified that he began this program on August 25, 2003, and is currently in his first semester. The claimant testified that he has applied for grants which pay his tuition and books.

On cross examination, the claimant agreed that he underwent a work hardening program as recommended by Dr. Armstrong and the people at the work hardening program and the therapist were aware that he was an over the road truck driver. The claimant agreed that he was released on April 17, 2002, from the work hardening program, where it was noted that he was functioning at the physical demand level required for his job as an over the road truck driver. The claimant agreed that on April 18, 2002, Dr. Armstrong then released him to return to work and assessed him with a 9 percent impairment rating. The claimant agreed that he did return to work for the respondent in April 2002 and at that time was making more money than he was prior to his injury. The claimant testified that the headaches which he had been experiencing after his accident became worse after he returned to work for the respondent and he reported this to Dr. Armstrong. The claimant agreed that he saw Dr. Gropper on July 10, 2002, and that he reported his headaches to Dr. Gropper. The claimant agreed also that Dr. Gropper did not

take him off of work but he did not go back to work for the respondent after July 10, 2002. The claimant agreed that he began being seen by Dr. Miller on September 9, 2002, and has seen him several times. The claimant testified that he also underwent a psychological evaluation by Dr. Kubinski on October 16, 2002. The claimant testified that he was sent by the respondent to see Dr. Gropper on March 12, 2003, and at that time Dr. Gropper reported that he had reached maximum medical improvement and assessed him with a 15 percent whole body impairment rating. The claimant testified that he underwent an IME with Dr. Luke Knox on June 12, 2003. The claimant testified that after he quit working for the respondent, he did apply for and began working for Monaco Coach. The claimant explained that this job entailed him driving a motor coach from one end of a production line to a gravel lot which was about two blocks away. The claimant testified that since Dr. Gropper released him in March 2003 he has not applied for any employment nor has he applied for unemployment benefits. The claimant agreed that he understood that Dr. Gropper had released him to return to work in the medium to heavy categories.

The medical records set forth that the claimant was seen at St. Edwards Mercy Medical Center on December 26, 2001, for treatment to his right shoulder with pain radiating into his right hand. The claimant's CT scan taken that day revealed a right para central disc herniation at C6-7. The claimant underwent an MRI of the cervical spine on January 4, 2002, which showed that he had a central/right para central disc protrusion and spur at C5-6 and a

right para central and lateral disc protrusion at C6-7. The claimant underwent conservative treatment but on February 6, 2002, Dr. Larry Armstrong operated on the claimant's cervical problem, performing an anterior cervical micro diskectomy with interbody fusion at C6-7 with nerve root and spinal cord decompression with removal of osteophytic spurs with Atlantis anterior cervical plate placement. Dr. Armstrong released the claimant to light duty work on March 7, 2002, but recommended work conditioning to help improve his strength and symptomatology. Dr. Armstrong writes on April 18, 2002, that the claimant has been undergoing work strengthening and conditioning at St. Joseph's Center for Industrial Rehabilitation in South Bend, Indiana, following his anterior fusion. Dr. Armstrong notes that he has reviewed the FCE which shows that the claimant's physical demand level would be in the medium to heavy category as of April 17, 2002. Dr. Armstrong writes that he agreed with the work restrictions as set forth in the FCE and rated that claimant with a 9 percent whole body impairment rating, further noting that the claimant had reached maximum medical improvement. Dr. Mitchell Gropper writes on July 10, 2002, that he has seen the claimant following his surgery and physical therapy sessions. Dr. Gropper notes that the claimant has returned to work and that the claimant reports that after working two weeks he started having spasms and increased pain in his neck and head. The claimant further reported that he started to notice facial numbness and tingling as well as hand numbness and tingling. Dr. Gropper recommended physical therapy, muscle relaxers and x-rays. Dr.

Gropper released the claimant to return to work on July 11, 2002, to full duty with no restrictions.

The claimant began treatment with Dr. David Miller on September 9, 2002, for his ongoing complaints of headaches and neck and shoulder pain. Dr. Miller recommended cervical epidural injections as well as physical rehabilitative therapies and some cognitive behavioral therapies for relaxation. Dr. John Kubinski writes on October 16, 2002, that he has seen the claimant for his persistent headaches. After consultation and evaluation, Dr. Kubinski writes that a significant contributing factor to the claimant's headaches is physical tension and that the physical therapy which he is currently receiving seems to be addressing this problem to some extent. Dr. Kubinski made recommendations to the claimant dealing with his ability to combat his headaches and to achieve muscle relaxation. Dr. Miller administered an epidural steroid shot to the claimant on November 8, 2002, and on January 14, 2003, Dr. Miller recommended that he continue low doses of opiates and to continue his physical therapy and to reconsider his cognitive behavioral strategy sessions. Dr. Miller administered a cervical facet joint injection on the claimant's right side on January 21, 2003. On February 17, 2003, Dr. Miller writes that the claimant reports recurrent persistent pain, noting that he was better after his cervical facet injection a month earlier which lasted for a couple of weeks then regressed to his normal amount of significant pain. Dr. Miller writes that he discussed long term strategies of health style changes such as smoking cessation,

weight reduction, physical therapy and cognitive behavioral treatments.

Dr. Mitchell Gropper writes on March 28, 2003, that the claimant has reached maximum medical improvement and that his permanent partial impairment rating is 15 percent to the whole body. Dr. Gropper notes that the claimant has permanent restrictions including lifting, carrying, pushing or pulling five to ten pounds frequently, up to forty pounds occasionally and the height must be between the knees to the head. Dr. Gropper writes that the claimant can sit, stand and walk for up to two and one half hours maximum at a time and he may bend, twist and turn occasionally. The claimant underwent an independent medical evaluation by Dr. Luke Knox on June 12, 2003. Dr. Knox notes that he has reviewed the claimant's past medical records and tests and after examination, Dr. Knox assessed the claimant with a 9 percent permanent partial impairment rating to the body as a whole based on the A.M.A. Guides, Fifth Edition.

After a review of this entire record, I find that the claimant has proven by a preponderance of the evidence that he is entitled to and in need of additional medical treatment as provided by Dr. Miller for the pain resulting from his compensable injury. The claimant's treating physicians have continually recommended physical therapy for his pain management as well as steroid injections. Therefore, I find that this claimant is entitled to continuing medical treatment for his compensable injury. I further find that the claimant reached his maximum medical improvement on

April 18, 2002. Although the claimant has required additional medical treatment, this has been for pain management only. Dr. Armstrong noted on April 18, 2002, that the claimant had reached maximum medical improvement and assessed the claimant with a 9 percent impairment rating at that time. When the claimant was seen by Dr. Gropper, after his initial visit, he was released to full duty work with no restrictions and then several months later when the claimant was again seen by Dr. Gropper in March 2003, Dr. Gropper notes that he had reached maximum medical improvement and released him with restrictions as set forth in the functional capacity evaluation. The indication in Dr. Gropper's report is that the claimant is capable of working within the medium to heavy category which was where he had been assessed at the time Dr. Armstrong had released him. Dr. Gropper's recommendations have been for pain management, therefore, I find that the claimant's healing period ended on April 18, 2002, as stated by Dr. Armstrong. The claimant has been assessed with a 9 percent impairment rating as well as a 15 percent whole body impairment rating, one by Dr. Armstrong and the other by Dr. Gropper. Dr. Gropper used the DEA diagnostic evaluation as setting the claimant's impairment rating, however, Dr. Armstrong used the whole body impairment rating Table 75 of the A.M.A. Guides, Forth Edition, which is more commonly used which would assess the claimant with a 9 percent whole body impairment rating. I find that Dr. Armstrong's impairment rating is more appropriate for this claimant since he has undergone a surgically treated disc with residual, medically documented pain

and rigidity. Dr. Luke Knox's evaluation as to the claimant's impairment rating was the same as Dr. Armstrong's, however, Dr. Knox used the A.M.A. Guides, Fifth Edition, which has not been accepted or approved at this time.

Based on the entire record, I find that the claimant has proven by a preponderance of the evidence that he is entitled to wage loss over and above his 9 percent whole body impairment rating in the amount of an additional 9 percent giving him a total of 18 percent permanent partial disability to the body as a whole. This determination of wage loss is based on the claimant's transferable job skills, age, education, physical limitations and restrictions. It is noted that the claimant is engaged currently in a retraining program which hopefully will be beneficial to him. However, it is still uncertain whether the claimant will be able to finish this program and at this point it is only speculation that his retraining will be successful. The respondent, however, is entitled to a credit for the temporary total disability which they have continually paid this claimant up until August 2003. This credit can be applied to the additional 9 percent disability.

#### FINDINGS & CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On December 20, 2001, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his neck on December 21, 2001.

4. The claimant is entitled to a weekly compensation rate of \$410.00 for temporary total disability and \$308.00 for permanent partial disability.

5. The respondents have accepted a 9 percent permanent partial impairment.

6. All medical expenses have been paid.

7. The claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury as provided for by Dr. David Miller. See discussion above.

8. The claimant reached the end of his healing period on April 18, 2002, as set forth by Dr. Armstrong. See discussion above.

9. The correct impairment rating for this claimant is 9 percent to the body as a whole as assessed by Dr. Armstrong. See discussion above.

10. The claimant is entitled to wage loss over and above his 9 percent impairment rating in the amount of 9 percent giving him a permanent partial disability rating of 18 percent to the body as a whole. This finding of additional disability is based on the claimant's age, education, transferable job skills as well as his physical limitations and restrictions. See discussion above.

11. The respondents are entitled to a credit for the continued payment of temporary total disability which can be applied to the additional permanent partial disability.

12. The respondents have controverted this claimant's entitlement to additional benefits.

13. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the indemnity benefits awarded herein.

ORDER

The claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury at the expense of the respondent.

The claimant reached the end of his healing period on April 18, 2002.

The claimant is entitled to wage loss in the amount of 9 percent over and above the 9 percent impairment rating giving him a whole body disability rating of 18 percent to the body as a whole to be paid by the respondents.

The respondents are entitled to a credit for the overpayment of temporary total disability.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such benefits.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

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ELIZABETH DANIELSON  
ADMINISTRATIVE LAW JUDGE