

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F204129 (3-26-02) & F303483 (4-02)

CLIFFORD ANDERSON, EMPLOYEE	CLAIMANT
CUSTOM METAL FINISHERS, EMPLOYER	RESPONDENT
LIBERTY MUTUAL INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED JUNE 9, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on February 20, 2004, at Jonesboro, Craighead County, Arkansas.

Claimant represented by the HONORABLE FREDERICK S. "RICK" SPENCER, Attorney at Law, Mountain Home, Arkansas.

Respondents represented by the HONORABLE MARK MAYFIELD, Attorney at Law, Jonesboro, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-styled claim to determine claimant's entitlement to workers' compensation benefits.

On October 29, 2003, a prehearing conference was conducted in this claim from which a prehearing order of November 12, 2003, was filed. The prehearing order reflects the stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' respective contentions relative to the issues. The prehearing order is herein designated a part of the record as Commission Exhibit No. 1.

The testimony of Clifford Anderson, the claimant, Sandra Anderson, Greta Mundy, Barbara Gifford, Ron Hicks, Gene Galbraith, Jim Jones, Mike Gifford, and Dennis Maple, coupled with medical reports and other documents, comprise the record in this claim.

DISCUSSION

Clifford Ray Anderson, the claimant, with a date of birth of July 29, 1955, has an eleventh grade education. The claimant commenced his employment with respondent on or about January 17, 1996, and last performed employment services for same on August 14, 1992. During the course of his employment with respondent the claimant worked as a general laborer in a supervisory capacity.

There is no evidence in the record to reflect that the claimant experienced limitations or restrictions on his physical activity prior to his employment with respondent. The claimant has a long and varied work history since quitting high school in the twelfth grade. The evidence discloses that the claimant's work history included factory work, a long haul truck driver, and a pest control worker. The claimant's testimony reflects that after working for Terminix Pest Control for several years, he relented and agreed to work for respondent. The claimant noted that the owner of respondent, John Williams, who is his first cousin, had been asking him to come to work for him for some period of time.

The evidence in the record reflects that respondent-employer employed six to ten employees, to include five salaried employees and five hourly employees. Further, the salaried employees of respondent are related to the owner, to include Barbara Gifford, the president of respondent-employer, her husband, and two brothers.

Barbara Gifford, the president of respondent-employer, testified regarding the nature of the business of same:

We put a metal, zinc only, yellow or clear, the color is to differentiate parts for our customers. We melt basically zinc that weigh a pound. We get them in a ball type. They weigh a pound apiece, zinc, the 99.9% zinc. We melt that in these vats. It's like a golf sleeve and it's melted. Basically it goes through like a cooking process. You've got tanks, vats along the wall and the metal part – like this is plated. This is plated.

* * *

The microphone stand is plated. The bottom of your telephone is plated. We do no advertising. On his laptop are plated. Your doorknobs, your eyeglasses, a lot of that. Jewelry is plated. If it doesn't say pure gold or if it says gold plated, you can plate gold but we do zinc only. And we zinc plate metal, raw metal parts of different shapes and sizes and weights, basically as a rust treatment. It's very glamorous. (T. 121-122)

It is undisputed that the claimant suffered a compensable injury on March 26, 2002, within the course and scope of his employment. In describing the mechanics of the March 26, 2002, injury the claimant testified:

I went – I reached down – our tanks, you know, they're I don't know, they're about a little wider than this table is, and I reached over inside this tank with a syphering hose and got my hose filled up with water. I had a loose – I had a coat on because it was winter, well, yeah, March, and I reached down in it like that, and when I reached down like that, that gear about that big around, metal gear, grabbed a hold of my coat, and it sucked me down where it had me all the way up here, the back of my neck.

* * *

And it had – it made a tourniquet right there. That's
where the gear got me at right there.

* * *

You can still see the kind of like an imprint of a bruise right there, you know.

* * *

And I couldn't get out of it. There wasn't nobody – she was over playing the computer in her office. I sent one guy home. She told me to send one of my guys home, so I sent one of my guys home. We just got back from dinner, and this other guy he had to have him something to eat, so he goes over to the restaurant, and while he is gone to the restaurant is when I got caught. And by the time he got back I done had the coat ripped off of me. It ripped it up the seams and across here. (RX2, p. 30-31)

The claimant had reached his left arm into the barrel to retrieve the water at the time the coat was grabbed by the gear mechanism and he was pulled into same. The claimant's jacket was torn from him by the gear mechanism which afforded him an opportunity to escape from same. The claimant estimated that he was lodged in the gear mechanism for ten to fifteen minutes as he pulled, struggled to free himself.

The testimony in the record reflects that when the claimant's accident was reported to Ms. Barbara Gifford, the president of respondent-employer, the claimant related that he did not feel that he was injured and did not want medical treatment. Medical treatment was offered and encouraged by Ms. Gifford relative to the claimant's injury.

Regarding his escape from the gear mechanism, the claimant testified:

When that touched my flesh, the good Lord got me out.

* * *

That's the only thing that I could tell you, because, you know, I tried everything to get out of it, and I couldn't get out. I couldn't get my jacket off, and I just kept pulling and pulling and pulling and the good Lord is the only thing that got me out of it, you know. (RX2, p. 35)

The claimant attributed the unawareness of the severity of his injury or the fact that he had even suffered an injury to the fact that he was in shock:

My wife called, and she, I don't know, she – I didn't even think I was hurt, you know, because I was in so much shock. I didn't realize, you know, I was even hurt, you know. (RX2, p. 37)

The claimant's wife called within five minutes of the accident and during the course of the conversation with Ms. Gifford was notified of the accident and solicited to encourage the claimant to seek medical treatment.

The claimant sought and obtained medical treatment under the care of Dr. Michael Langley, a Walnut Ridge family practitioner relative to the March 26, 2002, injury. The claimant was referred by Dr. Langley to Lawrence Memorial Hospital for x-rays of his left shoulder attributable to the March 26, 2002 injury. (CX1, p. 1) Regarding the symptoms experienced at the time of his March 26, 2002, initial visit to Dr. Langley, claimant's testimony reflects:

Burning in my shoulder and my muscle was hurting all the time right here, and this was cramping all the way down into here and these fingers was, you know –

Tingling and my hand changes color, you know, and I had real bad headaches and all that. (RX2, p. 38)

In addition to x-rays, the claimant was furnished medication by Dr. Langley relative to his injury during the March 26, 2002 visit.

The medical in the record reflects an off work slip authored by Dr. Langley dated April 2, 2002 reflecting that the claimant could return to work on April 2, 2002 performing light duty. (CX1, p. 2) The evidence reflects the claimant was off work following the March 26, 2002 injury which was a Monday through the weekend. The testimony presented by the claimant reflects that although he was scheduled to be off work on Monday, April 1, 2002, when he presented the off work slip to Ms. Gifford she contacted Dr. Langley's office and arranged to obtain a light duty release, thereby allowing him to return to work. The medical in the record does reflect that a limited duty work release authored by Dr. Langley dated April 2, 2002.

The claimant asserts that while performing light duty work he suffered a second injury to his left arm which required medical treatment. The claimant's testimony reflects:

I was on the rack line and I was holding them, trying to do them parts and I hurt my arm again trying to do that.

* * *

It's hard to say. Some of them parts weighs sixteen pounds, some of them weigh two pounds. (T. 55)

The claimant asserted that the second injury occurred while discharging employment duties for respondent on or about April 10, 2002, and that he sought medical treatment from Dr. Langley thereafter.

The testimony of Ms. Barbara Gifford reflects that based upon the claimant's time cards, he did not work on April 10, 2002. Ms. Gifford's testimony reflects, regarding the April 10, 2002 date:

He did not have a time card. We pay from Sunday to Saturday. And then we get the – we don't hold back any and I date the check, like say he worked on a Monday, he will get the following Wednesday a

check. Not the Wednesday of the Monday he worked. He'd get a check on a Wednesday of the Saturday that he worked, okay? Do you see what I am saying? The week ended on Saturday. The following Wednesday they got a check for that week. I have a time card dated April 3 which is the time card for the end of the week of the week that he got hurt and then the next time card I got ends April 10, which is a Wednesday, but his time card ended Saturday, April 6. He worked eight hours that week, eight hours total. He did not come back to work until July 26, which was a Friday, in that whole entire time. He did not work on April 10. (T. 142-143)

Specifically, Ms. Gifford's testimony reflects that the claimant worked 6.25 hours on Monday, April 1, 2002, and 2.75 hours on Thursday, April 4, 2002.

The testimony in the record reflects that respondent-employer paid for the initial visit of the claimant to Dr. Langley as well as for the initial prescription for pain medication generated as a result of the visit. In that regard, the testimony of Ms. Barbara Gifford, the president of respondent-employer, reflects:

Two reasons. One, he is a relative and, two, he didn't think it was very serious. I knew that he didn't have much money and we've done it before for other people.

* * *

I called the doctor and I called the pharmacist and I told them who I was and we have a tab at each place and I said, we've paid monthly, as we do a lot of places in Walnut Ridge, it's a small town, and I said, Cliff has hurt himself and I'm going to pay, the shop is going to pay for the doctor bill and the prescription. Three or four or five days later, it was in the middle of the week, Stan was the pharmacist called me and said

—

* * *

I'm sorry. Okay, the middle of the next week without asking me or letting me know, he tried to get another prescription for pain pills and I was asked if the shop was going to cover that expense and I said, no. And at that time I told him he had to go on workman's comp. (T. 117-118)

Mrs. Gifford's testimony reflects that the claimant was reluctant to go on workman's compensation because of the reduction in pay that he would receive.

Claimant testified that he is unable to read and comprehend subject matter read very well. The testimony of the claimant reflects that on or about April 11, 2002, he received a telephone call at his residence from Mr. John Williams, the owner of respondent-employer. Claimant maintains that during the course of the telephone call he was cursed by Mr. Williams and accused of only wanting to get medication and workman's compensation checks. The evidence in the record reflects that following the telephone call from Mr. John Williams, the claimant's wife, Mrs. Sandra Anderson, telephoned Ms. Barbara Gifford, president of respondent-employer. Mrs. Anderson's testimony reflects that because of the nature of the telephone call from Mr. Williams, which she thought was uncharacteristic, she felt that possibly he was suffering from a medical condition of low sugar, and she wanted to alert Mrs. Gifford. During the course of her telephone conversation with Mrs. Gifford, the testimony of Mrs. Anderson reflects that she was informed that the claimant no longer had a job with respondent-employer and that he needed to turn in his keys and uniform.

An April 10, 2002, off work slip authored by Dr. Langley relative to the claimant reflects that the claimant was seen on said date and that the claimant was to remain off work for an indefinite period of time is corroborative of the above assertions of the claimant and his wife regarding their contact with Mr. John Williams and Ms. Barbara Gifford during the April 11, 2002 time frame. Mrs. Anderson stated that upon receipt of the letter from Ms. Gifford directing the claimant to turn in his uniforms and keys, the same did not reflect that the claimant's employment with respondent-employer had been terminated.

Upon receipt of the April 11, 2002, letter from Mrs. Gifford, the claimant's brother-in-law, Ron Hicks, accompanied him to the shop of respondent to turn in his keys and uniforms and to complete the necessary paperwork for the filing of a workers' compensation claim. The claimant explained that due to the fact that he was unable to read very well he wanted to have someone present that he trusted to read the documents that he would be signing to ensure that everything was proper. The claimant's wife worked at the time that he reported to the shop of respondent. The evidence in the record reflects that Ms. Gifford directed the claimant's brother-in-law to get out of the office. Mr. Hicks' testimony reflects:

Yeah, and I left Clifford was telling her that he didn't want to have any trouble and didn't want it to be like this and I saw {sat} down and she was telling me to get out so I couldn't really hear much everything that she was saying, but, you know, they was making me leave at the same time. (T. 105)

Mr. Hicks' testimony further reflects, regarding Ms. Gifford's actions:

She was mad because I walked in. I don't know why. As soon as I walked in she was mad.

* * *

She told me – you want me to tell you exactly what she said?

* * *

She told me to get my ass out and get in the car and get off the parking lot. (T. 105)

Ms. Gifford acknowledged that she directed Mr. Hicks, the claimant's brother-in-law to leave the shop during the April 2002 visit:

I told him to leave the building. I went outside and I told him to stay in his car but I told him to leave the building. I did not know at that time why he was there. I was trying to get Clifford in to fill out his comp papers. Here again, this was in April. Cliff is saying in August he told me he couldn't read. I didn't know in April he could not read. I had no idea why this other gentleman was there. But at the same time I had called one or two other employees over. I did not cuss the man. I did not. (T. 127)

As previously noted, Mrs. Gifford's testimony reflects that the claimant did not again discharge employment duties for respondent after April 4, 2002, until July 26, 2002. The testimony of the claimant reflects that after the encounter on the property of respondents wherein he turned in his keys and uniforms he did secure the services of an attorney to represent him in the claim. The testimony presented by the claimant further reflects that during his follow-up visit with Dr. Langley he was informed by same that he had nothing further to offer relative to treatment and that he could not refer the claimant to another physician. The record reflects that an April 26, 2002, letter from Mrs. Gifford to the claimant's former attorney. The letter referenced the April 15, 2002, visit of the claimant to the shop of the respondent-employer regarding the completion of paperwork to initiate the workers' compensation claim. The letter further reflects:

Both Dr. Langley and his nurse, Mary Hall, have told Mr. Anderson to seek the services of another physician since the x-ray from Lawrence Memorial Hospital came back negative, meaning no injury is shown. Further tests are needed to show any image. This has been explained to Mr. Anderson several times, in several ways.

Custom Metal Finishers, Inc. is not now, nor have we ever contested Mr. Anderson's compensation claim.

He simply needs to come in and fill out the appropriate forms to get the claim started. This, too, has been explained to him and his wife over and over again. (RX1, p. 2)

April 24, 2002, the claimant initiated treatment under the care of Dr. Mary Shields, a Batesville general practitioner. Under Dr. Shields' care and treatment the claimant underwent an MRI of his left shoulder at St. Bernard's Medical Center as well as additional diagnostic studies. Further, the claimant was directed to remain off work by Dr. Shields and other medical providers.

The claimant was referred by the nurse case manager, Sharon McCarroll, to Dr. Jason C. Brandt, a Jonesboro orthopedic physician. There is no evidence in the record to reflect that a formal change of physician petition was submitted to the Commission or an Order changing the claimant's treating physician from Dr. Shields to Dr. Brandt was entered by the Commission. On June 11, 2002, the claimant underwent surgery under the care of Dr. Brandt in the form of a subacromial decompression relative to his March 26, 2002, injury. A July 24, 2002, office note of Dr. Brandt relative to the claimant reflects, in pertinent part:

. . .His original injury was to 3-26-02 when he was working. He got his coat caught in a gear work and had a twisting injury to his left arm. His motion has improved. His symptoms have improved although he still has some burning sensation in the anterior aspect of his left shoulder. He complains of a knot in the anterior distal down toward region on his left shoulder. . .

At present I am concerned with his difficulty sleeping and with the overlying symptoms. There may be a original pain syndrome type I symptom going on here. . . We will also continue therapy and apply local modalities to this symptomatic region. At present, work restrictions are no overhead duty, five pounds lifting restrictions. I will see him in four weeks.

(CX1, p. 5)

The testimony of the claimant reflects that when he returned to the employment of respondent on July 26, 2002, he presented the limited duty release from Dr. Brandt. The claimant maintains that he was assigned job duties by Mrs. Gifford contrary to light duty restrictions. Specifically, the claimant asserts that he was assigned duties pulling grass out of the sidewalk, sweeping with an industrial push broom, cleaning the bathrooms and commodes, and painting a floor with a roller. While the claimant acknowledged the afore activities could be accomplished with the use of one hand, the movement in performing same aggravated and exacerbated the symptoms in his left shoulder, neck and upper extremity.

The claimant's testimony reflects that he complained to Ms. Gifford regarding the job tasks he had been assigned after he furnished her a light duty release from the office of Dr. Brandt. The claimant maintains that Ms. Gifford told him that she would contact Dr. Brandt's office to ensure that light duty assignment was within the claimant's physical restrictions. The claimant's assigned job duties on the date in question entailed pulling grass off the sidewalk. The claimant asserts that Ms. Gifford returned and related that she had talked to a "Kathy" in the doctor's office and that the assigned job duties were within his restrictions. The testimony presented by the claimant reflects that later the office of Dr. Brandt was contacted by the claimant's wife, and it was relayed that there was no "Kathy" in the office, nor had there been a discussion with Ms. Gifford relative to the claimant's light duty job assignment. The claimant's testimony reflects, regarding the last date he discharged employment duties for respondent:

After – I thought she was telling the truth, you know, because she, you know, never lied like that before to me so I went ahead and finished the day out, you

know, and I was hurting real bad when I got home –
(T. 61)

The testimony in the record reflects that the claimant thereafter contacted the claim adjuster who in turn contacted the office of Dr. Brandt. As a consequence of the afore, Dr. Brandt took the claimant off work, and respondent-carrier initiated the payment of temporary total disability benefits to the claimant.

The testimony of Ms. Barbara Gifford, the president of respondent-employer, reflects that the claimant last discharged employment duties on August 14, 2002. Ms. Gifford denies that she assigned the claimant job duties in violation of the medical restriction of his treating physician. Further, Ms. Gifford denies any knowledge of an alleged telephone call to the office of Dr. Brandt or discussion regarding a "Kathy" in Dr. Brandt's office. While Ms. Gifford presents a time card with a notation on the back purportedly reflecting the claimant concurring that he was not required to perform certain job duties, the same is of little or no probative value in light of the fact the claimant is functionally illiterate. (RX1, p. 7)

It is not disputed that the claimant received temporary total disability benefits from the point in time that he last discharged employment duties for respondent until on or about January 5, 2003. The evidence clearly reflects that the claimant had authorized treating physicians from which he received active medical treatment through December 2002. The record reflects an August 12, 2002, off work slip issued by Dr. Brandt wherein the claimant was released to return to light duty work on August 14, 2002. Restrictions placed upon the claimant by Dr. Brandt pursuant to the August 12, 2002, limited duty release included, "no overhead activity – right arm work only – with sedentary duty. Work must be adjusted if he experiences pain". (CX1, p. 8) A August 28, 2002 off duty slip

from Dr. Brandt took the claimant off work until a scheduled September 4, 2002, appointment with Dr. R. Edward Cooper, a Jonesboro orthopedic physician. (CX1, p. 11)

The claimant was referred by Dr. Brandt to Dr. Cooper relative to the March 26, 2002, injury. Under the care and treatment of Dr. Cooper the claimant underwent a myelogram and post myelogram CT of the cervical spine. (CX1, p. 12) The claimant's testimony reflects that his treatment under the care of Dr. Cooper was painful, myelogram, and as a consequence, he directed his attorney to request a change of physician to Dr. Gregory Ricca. Prior to any action being taken on the request, the testimony reflects that the nurse case manager scheduled an appointment for the claimant to be evaluated by Dr. Terence Braden, an osteopathic physician.

The credible testimony in the record reflects that the claimant cooperated fully with each of his treating physicians. The claimant explained that he wanted his arm to get better and so he followed the instructions of the physicians.

On September 27, 2002, the claimant was seen by Dr. Terence C. Braden, III, D.O., pursuant to the direction of Ms. Sharon McConnell, the nurse case manager. Dr. Braden's September 27, 2002 report illustrates the involvement of the nurse case manager:

There has been a request for an Independent Medical Evaluation as well as treatment of Mr. Anderson. These are usually exclusive, but Mr. Anderson's treatment as well as input has been arranged. (CX1, p. 13)

The report further reflects a history of the claimant's injury as well as a summary of the medical treatment received by the claimant relative to same. Further, the report reflects that Dr. Braden had access to and reviewed the claimant's prior pertinent medical records. The September 27, 2002 report concludes:

Summary: Mr. Cliff Anderson is a 40-year-old male who sustained a traction injury to his left upper extremity with twisting to the left proximal arm. This occurred in March of 2002 with continued pain and symptomatology in the left upper extremity. I have been asked by Ms. Sharon McCarroll, his nurse case manager, to address some questions, and they are as follows:

1. The status of Mr. Anderson's current condition and diagnosis: It appears as though Mr. Anderson has complex regional pain syndrome in the left upper extremity. This could have been caused by the traction injury to the left arm itself as well as the twisting that occurred in a tourniquet-type fashion around the proximal arm. This would also explain the findings on the electro diagnostic testing by needle exam in the C5 distribution the deltoid and the biceps are both affected.

2. I have reviewed the test results with Mr. Anderson as requested.

3. I have reviewed the list of medication he is currently prescribed. They appear to be appropriate. I would recommend and have instituted an increase in his Neurotin dose since he has been taking 300 mg three times a day for one week. I think we should increase this to 300 mg two tablets in the morning and two tablets in the evening. (1200 mg orally a day) and then continue with this four or five days, further increasing them to 600 mg three times a day. The dose can be increased higher, and I think Dr. Shields has done an excellent job of adding Neurotin to his regime, which I am hopeful will give him some improvement in his symptomatology.

4. I have asked to identify why his blood pressure has been up. I think his blood pressure has been up because his pain has been up; and as his pain symptoms increase or his pain symptoms give him difficulty, then the blood pressure will also rise. This will make it very difficult for Dr. Shields to control,

though.

5. I have been asked for a plan of treatment. My plan of treatment at this time is to increase his Neurotin. I also discussed with Mr. Anderson that the continued use of narcotic analgesics would not be in his best interests from a tolerance as well as from an addiction standpoint. He understands this. I think referral for Pain Anesthesia for consideration of satellite ganglion or other nerve block would be appropriate to see if we can give him some distinct improvement in the left upper extremity.

6. I think he should remain off of work environment until we can ascertain a safe and comfortable return, hopefully with an aggressive and expedient manner.

7. It is unknown at this time what the further expected course and length of treatment to obtain maximum medical improvement will be.

The above was discussed in conference with Ms. Sharon McCarroll at the conclusion of Mr. Anderson's visit as well as with Mr. Anderson and his wife. (CX1, p. 16-17)

The evidence in the record reflects that the claimant was referred by Dr. Braden to Dr. Colin Savu, a pain medicine specialist, for treatment relative to the March 2002 compensable injury. The claimant also received treatment under the care of Dr. Shields relative to his elevated blood pressure, as noted in the September 27, 2002 report of Dr. Braden. While under Dr. Savu's treatment the claimant underwent injections to address his pain complaints. The claimant noted that he did in fact have some injections which necessitated emergency medical treatment as a result of the adverse effects.

The testimony of the claimant reflects that he was seen one more time by Dr. Braden

following the referral to Dr. Savu. The testimony of the claimant reflects that Dr. Braden wanted to refer him to a neurosurgeon, Dr. Gregory Ricca. The credible testimony presented by the claimant and his wife reflects that Ms. McCarroll, the nurse case manager, relayed that she didn't feel that further treatment under the care of Dr. Braden would be beneficial. Regarding the referral by Dr. Braden to Dr. Ricca, the claimant noted that the respondent refused to allow or authorize same. As a consequence of the afore, the claimant was not allowed to return to Dr. Braden or to follow through on the treatment recommendation of same. Claimant continued to received medical treatment under the care of Dr. Mary Shields, his family physician, relative to the March 26, 2002, compensable injury.

The testimony of the claimant reflects that Ms. McCarroll, the nurse case manager, scheduled an appointment for him to be seen by Dr. John D. Brophy, a Memphis neurosurgeon. The claimant was seen by Dr. Brophy on December 23, 2002. During the August 12, 2003, claimant provided testimony regarding the extent and duration of the December 23, 2002, evaluation of Dr. Brophy. Further, the deposition reflects that the claimant and his wife were accompanied to the evaluation by a witness that they brought along, Ms. Greta Mundy. Regarding the evaluation by Dr. Brophy, the claimant's testimony reflects:

All he did is have me pull my shoes off, and he got done doing my, seeing if I had reflexes and stuff in my knees and my feet and stuff. He got ready to walk out the door, and I said, I asked him, Do you want to look at my arm, and he said, Yeah, go ahead and pull your shirt off and I'll be right back in. And I asked him why my shoulder blade swells up. It, you know, stays swelled up all the time. This up here swells up. Why is this burning right here? Why does that hurt so bad right there? He couldn't tell me nothing. He said I don't know. That's what he said. His exact words I

don't know. (RX2, p. 72-73)

The testimony of the claimant reflects that Ms. McCarroll was also present during the December 23, 2002 visit to Dr. Brophy's office.

The testimony of Mrs. Sandra Anderson, the claimant's wife, reflects that she and her friend, Ms. Greta Mundy accompanied the claimant to the December 23, 2002, visit to Dr. Brophy's office. Mrs. Anderson testified that the actual time that Dr. Brophy spent with the claimant was ten minutes maximum. Ms. Anderson further testified regarding the evaluation:

He looked – he looked at some myelogram x-rays, and he had my husband to pull his shoes off and socks off so that he could check his feet. And if my husband had not have asked him did he want to look at his shoulder, the man would have never even had him pull his shirt off and look at his back. (T. 26)

The record reflects a December 23, 2002, chart record of Dr. John D. Brophy, relative to the claimant. The chart note reflects a history of the claimant's March 26, 2002 injury, and treatment received relative to same. The report further reflects, in pertinent part:

TEST REVIEW: Cervical MRI dated 3 August 2002, demonstrates no evidence of HNP or nerve root compression per cervical myelogram/CT scan dated 18 September 2002 demonstrates no evidence of HNP or nerve root compression. Specific, there is excellent feeling of both C5 nerve roots. EMG/Nerve root conduction study dated 22 August 2002 is consistent with possible left C5 radiculopathy. This is based on the EMG findings and muscle testing of the deltoid and biceps. In my opinion, these changes could be the result of local trauma related to the tourniquet effect on his arm or the cervical incision in the left deltoid.

IMPRESSION: Cervical/trapezius myofascial pain syndrome without clinical evidence of radiculopathy or neuropathy or radiographic evidence of cervical

nerve root compression.

RECOMMENDATIONS: The radiographic studies were reviewed with Mr. and Mrs. Anderson. I have suggested initiation of a serious endurance exercise program such as walking with an exaggerated arm swing in an effort to tone his trapezius and cervical paraspinous muscle. There is no indication for surgical intervention. From a neurosurgical prospective, there is no objective reason why he could not return to work at full duty without restriction as of the 24 December 2002. He would be considered at maximum medical improvement on 24 December, 2002 with a PPI rating (according to AMA Guidelines, 5th Edition) of zero (0%). (CX1, p. 22-23)

The evidence in the record reflects that once respondent received a copy of the December 23, 2002, report of Dr. Brophy in January 2003, the claimant's temporary total disability benefits were discontinued. At this juncture it is noted that Dr. Brophy was not an independent medical evaluation contrary to the characterization of same by either Dr. Brophy, Ms. McCarroll, or any other party. Indeed, there is no evidence in the record to reflect that the Commission selected Dr. Brophy to perform the evaluation of the claimant on December 23, 2003.

The claimant had authorized treating physicians who continued to provide active reasonable necessary medical treatment relative to his March 26, 2002, compensable injury subsequent to the December 23, 2002, evaluation by Dr. Brophy. The claimant was seen by Dr. Shields subsequent to the December 2002 evaluation by Dr. Brophy. A January 9, 2003, report of Dr. Shields, relative to the claimant reflects, in pertinent part:

He does have an appointment with Dr. Safman in regards to his headaches, neck pain, and neuropathy for January 10 at 11:15 a.m. This is a physician with an extensive medical background who can give an objective opinion and, perhaps, make us a

recommendation, and is really in everyone's best interest to let Mr. Anderson be evaluated and see what else can be done for him before writing him off. I would please like you to take this letter very seriously (CX1, p. 24).

The claimant's testimony reflects that he was in fact seen by Dr. Bruce F. Safman, a Little Rock pain management physician, pursuant to the referral of Dr. Shields. The evidence further reflects that the claimant paid the cost of his treatment under the care of Dr. Safman. The claimant's treatment under the care of Dr. Safman included medication in the form of anti-inflammatories. The claimant estimated that he was seen by Dr. Safman on one to two occasions.

After claimant's visit with Dr. Safman, he was referred by Dr. Shields to Dr. Alonzo Burba, a Little Rock neurologist. The claimant's testimony reflects that he was seen by Dr. Burba on one occasion and that Dr. Burba, after noting the loss of deltoid muscle, wanted to schedule another round of diagnostic studies. The record reflects that on June 13, 2003, the claimant was referred to Dr. Burba by Dr. Shields. (CX1, p. 38) Dr. Burba did recommend a pain management program for the claimant.

The medical in the record reflects that the claimant was seen by Dr. Thomas M. Ward, a Little Rock pain management specialist, in November 2003 and diagnosed by same with a complex regional pain syndrome. (CX1, p. 41) The claimant continues to receive active medical treatment under the care of Dr. Ward through 2004. (CX1, p. 47-55)

The credible evidence in the record reflects that the claimant continues to require medical treatment. The claimant was taken off work by Dr. Jason Brandt, his authorized treating physician, in August 2002. The evidence reflects that the claimant has seen a number of physicians since August 2002, to include Dr. Shields, Dr. Braden, Dr. Savu, Dr. Burba, Dr. Ward and Dr. Brophy.

The only physician to opine that the claimant is at maximum medical improvement and capable of returning to work is Dr. Brophy. Significantly, physicians who have seen and examined the claimant prior to and subsequent to the December 23, 2003, Brophy visit reflects consistent findings relative to the claimant's need for medical treatment as well as objective medical findings as a basis of an injury and the need for such treatment. Further, the physicians consistently provided treatment options relative to the claimant's injury.

The claimant asserts that he suffered a new injury on or about April 10, 2002, to the same affected area as the March 26, 2002, initial injury, while discharging employment duties for respondent. Respondents deny that the claimant has suffered a new or subsequent injury on April 10, 2002. The claimant further asserts that he is entitled to medical benefits relative to the April 2002 injury as well as for the March 26, 2002, compensable injury. The claimant seeks reimbursement of sums heretofore expended for medical treatment relative to both injuries. Further, the claimant maintains that he is entitled to temporary total disability benefits subsequent to the termination of same in January 2003. Finally, the claimant asserts that the respondent terminated his employment and that he is entitled to additional indemnity benefits pursuant to Arkansas Code Annotated §11-9-505(a).

Respondents deny that the claimant suffered a new injury on April 10, 2002. As previously noted, respondent presents testimony to reflect that the claimant last discharged employment duties for same on April 4, 2002, and did not return to work until July 26, 2002.

Respondents further maintain that the claimant reached maximum medical improvement on December 24, 2002, pursuant to the December 23, 2002 evaluation by Dr. John Brophy. Accordingly, respondents assert that the claimant is not entitled to temporary total disability benefits

subsequent to December 24, 2002, and that he is not entitled to any permanent disability benefits based upon the report of Dr. Brophy.

Respondents note that the claimant filed for unemployment benefits in January 2003, however, did not receive same. Respondents take the position that the claimant should have returned to same following the December 23, 2002 visit to Dr. Brophy wherein Dr. Brophy opined that he had reached maximum medical improvement and could return to work.

The claimant acknowledged that the work performed by respondent entails heavy manual labor. Further, the evidence reflects that following the April 11, 2002, letter from respondent-employer to the claimant directing him to turn in his keys and uniform, claimant did in fact return to the employment of same in July 2002 following his release to light duty by Dr. Brandt. While claimant asserts that a December 2002, letter received from respondent terminating his employment the documents was not presented during the course of the hearing in this matter. Indeed, the testimony presented by respondent reflects that once claimant report by for work the same would be made available for him.

After a through consideration of all of the evidence in this record, to include the testimony of the witnesses, review of the medical reports, and application of appropriate statutory provisions, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. At all times pertinent the relationship of employee-employer-carrier existed among the parties.
3. On March 26, 2002, the claimant earned wages sufficient to entitle him to weekly

compensation benefits of \$227.00 for temporary total disability benefits.

4. On March 26, 2002, the claimant sustained an injury arising out of and in the course of his employment.

5. The claimant was temporarily totally disabled for the period beginning January 5, 2002, and continuing through the end of his healing period, a date to be determined.

6. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of March 26, 2002.

7. The respondents have controverted the payment of temporary total disability benefits subsequent to July 5, 2003, and the payment of incurred unpaid medical and mileage relative to the Claimant's March 26, 2002, compensable injury.

8. On April 10, 2002, the claimant did not sustain an injury arising out of and in the course of his employment.

CONCLUSIONS

In the instant claim, the compensability the claimant's March 26, 2002, injury is not disputed. Further, there is no disputed regarding the mechanics of the claimant's March 26, 2002, injury. The disputed regarding the March 26, 2002, compensable injury of the claimant centers on his entitlement to indemnity benefits subsequent to January 5, 2003, as well as incurred unpaid medical benefits. Claimant also asserts that he suffered an injury on April 10, 2002, growing out of his employment with respondent. Respondent has controverted the compensability of the April 10, 2002, injury in its entirety. The present claims are governed by the provision of Act 793 of 1993, in that claimant asserts entitlement to workers' compensation benefits as a result of injuries sustained subsequent to the effective date of the afore provisions.

The evidence discloses that subsequent to the March 26, 2002, injury claimant sought and obtained medical treatment under the care of the designated medical provider for respondent, Dr. Michael Langley. Claimant as was off work following the March 26, 2002, injury until April 1, 2002, claimant worked 6.25 hours on April 1, 2002, and 2.75 hours on April 4, 2002. While claimant worked the afore days, the evidence reflects that he was on restricted or light duty relative to the March 26, 2002, injury.

There is no evidence to reflect that the claimant was asymptomatic or reached maximum medical improvement relative to the March 26, 2002, compensable injury prior to July 26, 2002, the date that he returned to the employment of respondent following his last day of working for same on April 4, 2002. In short, following the claimant's March 26, 2002, compensable injury in the employment of respondent, he discharged employment duties on two occasions prior to being taken off work completely and undergoing a surgical procedure under the care of Dr. Jason Brandt. Claimant has asserted that he suffered a new injury of April 10, 2002, while discharging employment duties for respondent. The credible evidence in the record reflects that the claimant was not discharging employment duties on April 10, 2002, for respondent, and had not performed employment duties for same since April 4, 2002.

The Arkansas Supreme Court noted in Edens v. Superior Marble & Glass, 346 Ark. 487, 58 S.W. 3d 369 (2001), it is not a prerequisite to compensability that a claimant identify the precise date upon which an accidental injury occurred, but rather must only prove that the occurrence of the injury is capable to being identified. In the instant claim, while the claimant asserts that he suffered a new injury on April 10, 2002, the evidence preponderates that he was not performing employment services for respondent on April 10, 2002. The credible evidence does

reflects, however, that the claimant discharged employment duties on April 1, 2002, and again on April 4, 2002. Claimant, who was continuing to experience residuals or symptoms from the March 26, 2002, injury at the time he attempted to discharge employment for respondent on April 1, and April 4, suffered an increase in the symptoms in his left shoulder or upper extremity on the afore dates. The evidence preponderates that claimant in fact suffered a recurrence or an exacerbation of his March 26, 2002, injury on April 4, 2002.

A recurrence is not a new injury but rather a period of incapacitation resulting from a previous injury. Atkins Nursing Home v. Gray, 54 Ark. App. 125, 923 S.W.2d 897 (1996). A recurrence is when the second complication is a natural and probable consequence of the prior injury. Weldon v. Pierce Brother Construction, 54 Ark. App. 344, 925 S.W. 2d 179 (1996).

The evidence preponderates that following claimant's discharge of employment duties on April 4, 2002, he experienced an increase in his symptoms and was unable to continue performing employment services for respondent. Claimant sought and obtained treatment under the care of his family physician, Dr. Mary Shields, for complaint attributable to the March 26, 2002, compensable injury and exacerbation of the symptoms of April 4, 2002. Claimant was ultimately referred by Dr. Shields to Dr. Jason Brandt. In June 2002, Dr. Brandt performed surgery relative to the claimant left upper extremity. Claimant was released to light duty work by Dr. Brandt in July 2002, and returned to the employment of respondent.

The evidence preponderates that claimant was operating under medical restrictions or limitations relative to his employment activities upon his return to the employment of respondent in July 2002. Claimant was assigned job duties by respondent which exacerbated the symptoms of his compensable injury. As a consequence of the afore, claimant last discharged employment for

respondent on August 14, 2002. Claimant was off work pursuant to the directions of his treating physician, Dr. Brandt, thereafter. Claimant continued to receive active medical treatment under the care of Dr. Brandt, and other medical providers, to include Dr. Braden subsequent to August 14, 2002. Respondent initiated the payment of temporary total disability benefits to the claimant following his total incapacitation on August 14, 2002, and continue same through January 5, 2003.

On December 23, 2002, claimant was evaluated by Dr. John Brophy, a Memphis neurosurgeon, pursuant to the direction of respondent. Dr. Brophy's report of December 23, 2002, reflects the impression of cervical/trapezius myofascial pain syndrome relative to the claimant's complaint. Nevertheless, Dr. Brophy concluded, from a neurosurgical perspective, that there was no objective reason why the claimant could not return to work at full duty without restrictions as of December 24, 2002. There is no evidence to reflect that Dr. Brophy was aware of the claimant's regular job duties in the employment of respondent. Further, there is no evidence to reflect that Dr. Brophy has expertises in vocational rehabilitation or job placement. More important, the creditable evidence in the record reflects that the extent of the claimant's contact with Dr. Brophy on December 23, 2002, was of fifteen minutes duration with little more than slight attention being paid to the claimant's area of complaint, and even then only after the same was called to his attention. Finally, Dr. Brophy did not render any medical treatment to the claimant nor was he selected by the Commission to perform the evaluation. Nonetheless, respondents relied upon the report of Dr. Brophy in terminating the claimant's entitlement to temporary total disability benefits.

The evidence preponderates that the claimant continued to treat with his authorized treating physician subsequent to the December 23, 2002, visit of Dr. Brophy. Specifically, claimant was seen by Dr. Mary Shields subsequent to the visit and was later referred to other medical providers for

treatment attributable to the March 26, 2002, compensable injury. Medical treatment rendered to the claimant under the care of Dr. Shields and referrals therefrom, to include Dr. Bruce Safman, Dr. Lon Burba, and Dr. Thomas Ward, is reasonable, necessary, and casually related to the claimant's March 26, 2002, compensable injury.

Respondent-employer owes those benefits that are reasonable necessary in connection with a compensable injury sustained by the employee. Morrow v. Mulberry Lumber Company, 5 Ark App. 260,635 S.W. 2d 283 (1982); Dalton v. Allen Engineering Co., 66 Ark. App. 201, 989 S. W. 2d 543 (1999); Geo Specialty Chemicals v. Clingan, 69 Ark. App. 369, 13 S.W. 3d 218 (2000). Further, a claimant does not have to support a continuing need for medical treatment with "objective medical findings." Chamber Door Industries, Inc. v. Graham, 59 Ark. App. 224, 956 S.W. 2d 196 (1997). Respondents have controverted the incurred unpaid medical and milage relative to the claimant's March 26, 2002, compensable injury subsequent to the December 23, 2002.

Respondents terminated the claimant's temporary total disability benefits on or about January 5, 2003, based upon the December 23, 2002, report of Dr. Brophy. The evidence preponderates that the claimant remained with his healing period subsequent to December 23, 2002, relative to the March 26, 2002, compensable injury. Further, the claimant was totally incapacitated from engaging in gainful employment subsequent to the December 23, 2002, and has been so since August 14, 2002. Claimant acknowledged that in January 2002, he applied for unemployment benefits. The evidence preponderates that respondent-employer contested the claim for unemployment benefits and, as a consequence, claimant did not receive same. More importantly, the evidence discloses that the claimant continued to receive active medical treatment relative to the March 26, 2002, compensable injury subsequent to December 23, 2002, and that he was within his

healing period and totally incapacitated from engaging in gainful employment at the time of the application for unemployment benefits and thereafter.

Temporary total disability is that period within the healing period in which the claimant suffers a total incapacitate to earn wages. Arkansas State Highway & Transportation Department v Breshears, 272 Ark. 244,613 S.W.2d 392 (1981); Georgia-Pacific Corp. v Carter, 62 Ark. App. 162,969 S.W.2d 677 (1998). The hearing period is that period for healing of an injury which continues until the injured employee is as far restored as the permanent character of the injury will permit. If the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve the condition, the healing period has ended. Conversely, so long as the underlying condition has not become stable and further treatment options are available to improve the condition, the healing period has not ended.

In the instant claim, claimant continued to receive active medical treatment relative to his compensable injury geared toward improving the underlying condition causing the disability or injury. The evidence preponderates that the claimant remain within his healing period subsequent to December 23, 2002, and totally incapacitated from engaging in gainful employment as a result of the March 26, 2002, compensable injury. Respondents have controverted the claimant's entitlement to temporary total disability benefits subsequent to January 5, 2003, the date he last received temporary total disability benefits.

Claimant asserts entitlement to benefits under Ark. Code Ann. §11-9-505 (a). In the instant claim, claimant acknowledged that there was no work within his restrictions in the employment of respondent while he was within his healing period as a result of the March 26, 2002, compensable injury. Indeed, the evidence preponderates that when assigned to one handed work by respondent

pursuant to the limited duty release, claimant continued to experience creditable exacerbation of his compensable injury such that he had to return to his treating physician for medication relative to the symptoms. Further, there is no documentary evidence in the record to reflect that respondents terminated the claimant employment with same. In order to improve entitlement to benefits pursuant to Ark. Code Ann. §11-9-505(a)(1) the employee must establish: (1) that he sustained a compensable injury; (2) that suitable employment within his physical and mental limitations was available with the employer; (3) that the employer refuse to return the employee to work; and (4) the employer's refusal to return the employee to work was without reasonable cause. Torrey v. City of Fort Smith, 55 Ark. App. 226, 934 S.W.2d 237 (1996). In the instant claim, claimant has failed to sustained his burden of proof regarding the element required to prove entitlement to be benefits pursuant to Ark Code Ann. §9-11-505(a)(1). This claim is respectfully denied.

AWARD

Respondents are hereby ordered and directed to pay to the claimant temporary total disability benefits at a weekly compensation benefit rate of \$227.00, for the period covering August 14, 2002, and continuing through the end of the claimant's healing period, a date yet to be determined, as a result of the claimant's compensable injury of March 26, 2002. Said sums accrued shall be paid in lump without discount. Respondents may claim credit for sums heretofore paid toward the discharge of the aforementioned obligation.

Respondents are further ordered and directed to pay all reasonable related medical, hospital, nursing, and other apparatus expenses, to include medical related travel, growing out of the claimant's compensable injury of March 26, 2002.

Maximum attorney fees are herein awarded on the controverted portion of this Award,

pursuant to Ark. Code Ann. §11-9-715. Since the claimant's injury occurred after July 1, 2002, the claimant's attorneys fee is covered by the provisions of Ark Code Ann. §11-9-715 as amended by Act 1281 of 2002. Claimant's former attorney, Honorable John Barttelt, filed an attorney lien in these claims, and prior to disbursement of attorney fees pursuant to this Order, a resolution of the attorney lien question will be had.

This Award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

Andrew L. Blood
Administrative Law Judge