

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F204826

JON DRUMM

CLAIMANT

WILLIS SHAW EXPRESS, INC.

RESPONDENT

CRAWFORD & COMPANY,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED DECEMBER 22, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG, in Springdale, Washington County, Arkansas.

Claimant represented by EDDIE WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by CONNIE CLARK, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled case on September 27, 2004, in Springdale, Arkansas. A pre-hearing order was entered in this case on August 25, 2004. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of the pre-hearing order was made Commission's Exhibit No. I to the hearing.

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

1. On May 2, 2002, the relationship of employee-self insured- third party administrator existed between the parties.
2. The appropriate weekly compensation rates are \$234.00 for total disability and \$175.00 for permanent partial disability benefits.
3. On May 2, 2002, the claimant sustained various compensable injuries, including compensable injuries to his neck (C-spine) and left shoulder.
4. There is no dispute over the payment of medical expenses incurred through _____ July 13, 2004.
5. There is no dispute over the claimant's entitlement to temporary total disability benefits accruing through June 24, 2004.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The claimant's entitlement to continued medical services by and at the direction of Dr. Jeff Evans.
2. The claimant's entitlement to continued temporary total disability benefits from June 24, 2004 through a date yet to be determined.
3. Appropriate attorney's fees.

In regard to these issues, the claimant contends:

"The claimant contends that the respondents terminated the claimant's disability payments as of on or about June 6, 2003, although the claimant remains under active medical treatment and unable to work."

The claimant contends that his attorney is entitled to an appropriate attorney's fee on any disability benefits awarded in this case since the respondents are now neither paying temporary disability or permanent disability benefits although the medical records clearly show that the claimant has permanent injury in the form of at least a herniated disc in his cervical spine."

In regard to these issues, the respondents contend:

The respondents acknowledge and agree that the claimant sustained a compensable accidental injury in the course and scope of his employment on May 2, 2002. They timely accepted this claim as compensable and have paid all of the claimant's related medical expenses, as well as temporary total disability benefits from May 3, 2002 through June 24, 2004. The respondents discontinued the payment of TTD benefits based upon the June 7, 2004 report of Dr. Reginald Rutherford, in which the doctor found that the claimant has reached maximum medical improvement. The respondents, have however, continued to provide medical treatment as recommended by Dr. Rutherford-specifically, a SPECT scan of the claimant's brain and a neuropsychological evaluation by Dr. Judy White Johnson."

DISCUSSION

I. TEMPORARY TOTAL DISABILITY

_____ The first issue to be addressed concerns the claimant's entitlement to continuing temporary total disability benefits from June 25, 2004, through a date yet to be determined. The burden rests upon the claimant to prove his entitlement to these benefits. In order to meet this burden, the

claimant must establish that he has continued within his healing period from the effects of his compensable injuries on May 2, 2002, and has continued to be rendered totally disabled from performing any form of regular gainful employment as a result of these injuries.

The duration of the healing period is a medical question, which must be resolved on the basis of the greater weight of the credible medical evidence presented. The healing period ends when the underlying physical damage caused by a compensable injury has resolved or at least stabilized, at a level where nothing further in the form of time or medical treatment offers a reasonable expectation of improving the level of healing achieved. The mere continuation of symptoms is not sufficient, in and of itself, to extend the healing period.

The initial emergency room records of the Desert Valley Hospital (where the claimant was taken immediately following the May 2, 2002 motor vehicle accident) show that the claimant was complaining of pain in his left shoulder, back, extremities, chest, and abdomen. Physical examination revealed only multiple contusions and small bite marks to the tip of his tongue and upper lip. An x-ray performed on his left shoulder did reveal a possible AC (acromioclavicular) separation. However, x-rays of his chest, right wrist, pelvis, and right tibia/fibula were all interpreted as negative. An abdominal CT scan was also negative. The claimant was discharged from the emergency room that same day and directed to follow up with his family physician.

The claimant was next seen by Dr. Jimmie Taylor, who was apparently his family physician. In his initial visit (on May 8, 2002), Dr. Taylor records from the claimant a history of his motor vehicle accident and that it produced left shoulder, head, chest, and leg trauma. At that time, the claimant was also complaining of some memory loss. This is the first mention of any trauma or injury to the claimant's head. The initial emergency room records note no mention of any head complaints or signs of head trauma. Dr. Taylor's physical examination recorded only abrasions (road burns), decreased range of motion, tenderness in the claimant's left shoulder, and a swollen lip. He fails to note any signs of trauma to the claimant's head, such as bruising or swelling. Dr. Taylor diagnosed the claimant as experiencing a left shoulder AC separation. He prescribed topical

antibiotics for the abrasions. For the claimant's shoulder, he prescribed rest, oral medication, and physical therapy.

Dr. Taylor continued to treat the claimant through September 26, 2002. By May 22, 2002, the claimant's "road burns" were noted to have significantly resolved, and he exhibited a good range of motion in his left shoulder. However, on that date, the claimant complained of new symptoms in the form of weakness of his left arm that was worsened by use. On June 5, 2002, Dr. Taylor recorded that the claimant continued to exhibit a good range of motion in his left shoulder, but continued to experience some memory loss and was now exhibiting a mild loss of range of motion in his neck or cervical spine. On his July 3, 2002 visit, the claimant's complaints appear to have been focused on his neck pain and the presence of increased back pain, after doing his physical therapy exercises at home. On physical examination, Dr. Taylor noted a good range of motion of the back, but tenderness and tightness of the supraspinatus muscles. On July 31, 2002, Dr. Taylor recorded continued complaints of some neck pain, a slight decrease in cervical range of motion and soft tissue tenderness. He continued the claimant's conservative treatment modalities. On August 28, 2002, Dr. Taylor noted a full range of motion of the neck and stated that the claimant's injuries were resolving. He further opined that the claimant should be able to return to work on September 30, 2002. In his final visit of September 26, 2002, Dr. Taylor noted that the claimant was "doing pretty good." He did observe that the claimant related a history that he was doing some "drywall work and popped something in his shoulder" which the claimant indicated made his shoulder feel better. Again, it was Dr. Taylor's assessment that the claimant's motor vehicle injuries were resolving. The claimant testified that when Dr. Taylor released him to return to work, he filed for and obtained a change of physicians to Dr. Jeffrey Evans.

The medical record shows that the claimant initially saw Dr. Evans on October 17, 2002. At that time, Dr. Evans noted that the claimant was complaining of neck pain and bilateral hand numbness since the motor vehicle accident on May 2, 2002. Again, new complaints appear to arise that were not noted in the initial medical reports of the Desert Valley Hospital emergency room

or by Dr. Taylor. On physical examination, Dr. Evans noted that the claimant's neck was non tender and had a full range of motion. He indicated that a Spurling's test was positive on left and negative on the right (this test checks for complaints of pain upon a particular movement of the neck). He also noted that the claimant exhibited a full range of motion in both his shoulders with complaints of pain only with greater than 90 degrees of abduction toward flexion on the left. Anterior apprehension testing and relocation testing was recorded as positive on the left and negative on the right. Finally, a sulcus test was noted to be negative bilaterally. X-rays of the claimant's left shoulder were interpreted by both the radiologist and Dr. Evans as being normal. Based upon the claimant's complaints and the result of the Spurling's test, Dr. Evans diagnosed a herniated nucleus pulposus at C6-7. Based upon the claimant's complaints and his clinical testing, Dr. Evans diagnosed a left shoulder anterior instability.

Dr. Evans' diagnosis of a herniated disc at C6-7 was effectively limited by a subsequent cervical MRI that was performed at Dr. Evans' request on October 15, 2002. This test showed no herniation, bulge, or other defect involving the C6-7 disc and showed only minimal degenerative arthritic changes at the C2-3 and CT 3-4 levels. A subsequent MRI of the claimant's left shoulder, which was also performed at the request of Dr. Evans, showed only a subchondral cyst that would be unrelated to any trauma and a small amount of fluid in the subacromial/subdeltoid bursae and the biceps tendon sheath. This study showed no evidence of any significant injury, such as rotator cuff or tendon tear.

The claimant was next seen by Dr. Evans on November 5, 2002. At that time, Dr. Evans noted that the MRI of the left shoulder showed only very slight subacromial bursitis and was otherwise normal. He also conceded that the MRI of the claimant's cervical spine was essentially normal. He stated that his physical examination of the claimant, on that date, remained unchanged. Apparently, as a result of the negative MRI studies, Dr. Evans changed his assessment of the claimant's cervical difficulties to a "whiplash injury" and his left shoulder difficulties to "anterior instability." The diagnosis of Dr. Evans of a "whiplash injury" would appear inconsistent with the

mechanics of the actual accident as described by the claimant (i.e., he stated that he was not seated facing forward at the time of the accident but was lying down prone in the sleeper). The medical records show that Dr. Evans instituted conservative treatment for his diagnosed injuries, including physical therapy.

The claimant returned to Dr. Evans on December 18, 2002. At that time, the claimant was noted to voice continuing complaints with his left shoulder and neck. However, he now complains of decreased sensation on the left side of his upper back, as well as his left arm. On physical examination, the claimant continued to exhibit a full range of motion in his neck and both shoulders. Based upon these new complaints, Dr. Evans ordered an MRI of the claimant's thoracic spine and nerve studies of his left upper extremity.

The MRI of the claimant's thoracic spine revealed only systemic or degenerative changes involving the claimant's thoracic spine. These findings were in the form of a Schmorl's node of the inferior end-plate of T-10, an abnormality within the anterior body of the T8 vertebra, and a mild broad based disc bulge at T9-10. Nerve conduction studies (performed on January 13, 2003), were interpreted as entirely normal with no evidence of median or ulnar neuropathy involving the claimant's left upper extremity.

Dr. Evans next saw the claimant on January 23, 2003. At that time, he noted that the claimant was continuing to complain of numbness and now pain in his mid back. He further indicated that the claimant's physical examination was essentially unchanged but that physical therapy reports indicated an improvement in strength and range of motion. He also opined that the thoracic MRI showed vertebral body "edema" of the T6-T7, and T8 vertebra, as well as the broad based disc bulge at T9-10. This edema was apparently not found by the radiologist interpreting this study. At the time of this visit, Dr. Evans directed the claimant to continue his physical therapy, to remain off work, and to return for follow up in one month. Dr. Evans also recommended a neurosurgical evaluation.

On February 20, 2003, the claimant was again seen by Dr. Evans. At that time, Dr. Evans noted that the claimant continued to experience numbness in the thoracic spine around the T8-10 level on the left, that the pain at the base of his neck had increased, and that he was now experiencing some posterior occipital headache-type symptoms. However, he also noted that the claimant's left shoulder was "feeling much better." On his physical evaluation, he continued to note full range of motion to the claimant's neck or cervical spine and that the claimant's Spurling's test was now negative on the left. He stated that the claimant displayed normal and bilateral muscle strength of all the muscle groups in his upper extremities and intact sensation of his upper extremities. He did note that the claimant continued to exhibit a loss of sensation in the thoracic spine on the left at the T8 through T10 levels. In regard to the claimant's shoulder difficulties, he observed that the claimant continued to exhibit a full range of motion of the left shoulder and that the apprehension tests and the sulcus tests on the claimant's left shoulder were now all negative. At this point, he directed the claimant to continue his physical therapy, but released him to return to light duty (doing basically desk work only). He now recommended an evaluation by a neurologist, for the claimant's headaches, and continued to recommend a neurosurgical evaluation.

The recommended neurological evaluation was performed by Dr. Janice Keating, on March 17, 2003. In her history, Dr. Keating recorded that the claimant advised her that he did not remember whether or not he had lost consciousness at the scene, but that he was able to give the EMT's the appropriate information (it would appear from the emergency room records of the Desert Valley Hospital that he was also able to give the personnel there the appropriate information). The claimant further related to Dr. Keating that one of the EMT's told him that during parts of the conversation he was "not coherent" (a statement not supported by the medical evidence presented). The claimant advised Dr. Evans that he had some facial lacerations, but required no surgery (the only facial lacerations recorded by the emergency room personnel were the small bite marks to the tip of his tongue and his upper lip). The claimant stated that he had some immediate bruising in the area of this thoracic spine (there is again no mention of any such

bruising in the prior medical records). The claimant also stated to Dr. Keating that his headaches began a month or so after the motor vehicle accident (at the hearing, the claimant testified that his headaches began a day or so later). The only mention of headaches in any of the medical records, until Dr. Evans report of February 20, 2003, involves a long history of migraine headaches which pre-existed the wreck on May 2, 2002. Finally, Dr. Keating noted that the claimant informed her that a CT scan of his brain was performed at the emergency room of the Desert Valley Hospital, which he thought was normal. However, there is no indication that such a study was in fact performed at the emergency room of the Desert Valley Hospital, or even contemplated.

On physical examination, Dr. Keating noted only a mild exaggerated physiologic tremor of the claimant's head and upper extremities (the left greater than the right), tenderness over the upper cervical paraspinal muscles (particularly on the left), and a reproduction of his occipital pain by the application of pressure over the left greater occipital nerve region. Otherwise, the claimant's neurological evaluation was entirely normal.

As a result of this evaluation, Dr. Keating opined the opinion that the claimant's headaches, in the left occipital region could be the result of a neuralgia of the left occipital nerve or possibly of a migraine nature. She recommended initial medical treatment in the form of a left occipital nerve injection. If this injection was ineffective or only partially effective in relieving the claimant's symptoms, she recommended that appropriate migraine treatment be instituted. Finally, she recommended a CT of the claimant's brain to exclude any surgical lesion at the cause of his symptoms. In regard to the claimant's mild exaggerated physiological tremor of the head and left upper extremity, she indicated no etiology for these difficulties but stated that no specific treatment was required for these at that time.

The claimant was next seen by Dr. Evans, on March 20, 2003. Dr. Evans stated that the claimant had received the occipital nerve injection by Dr. Keating with only "some relief" of his headaches. He noted that the claimant's shoulder complaints continued to improve with physical therapy, but that the decreased sensation over the left side of his upper back continued. On physical

examination, Dr. Evans again observed that the claimant continued to exhibit a full range of motion of the left shoulder and all tests of this portion of his anatomy were negative. At this time, Dr. Evans decided to refer the claimant to Dr. Douglas Brown (a neuropsychologist) to evaluate his complaints of memory loss. He continued to recommend the neurosurgical evaluation, although at that time it was now for the claimant's his thoracic complaints, rather than his previous cervical complaints. For some reason, he also referred the claimant for an audiological evaluation and an ophthalmological evaluation.

On March 25, 2003, the CT scan of the claimant's brain (recommended by Dr. Keating and Dr. Evans) was performed. This study was interpreted as entirely negative and showed no indication of the presence of any physical damage to the claimant's brain.

The claimant next saw Dr. Evans on May 21, 2003. At that time, Dr. Evans noted that the claimant's thoracic spine pain had become severe. On his physical examination, he also indicated that while the claimant exhibited a full range of motion in his left shoulder, he noted mild crepitus on movement. This is the first mention in any of Dr. Evans's reports of that finding. The claimant was directed to continue his physical therapy.

The claimant next saw Dr. Evans on June 24, 2003. At that time, Dr. Evans observed an improvement in the claimant's upper back difficulties. On physical examination, he noted exhibited full range of motion of the claimant's left shoulder and that all shoulder tests were negative. There is no mention in this evaluation of any crepitus upon movement of the claimant's left shoulder. Dr. Evans directed the claimant to continue the physical therapy and reaffirmed his referral of the claimant for a neurosurgical evaluation and a neuropsychological evaluation. He also recommended an evaluation of the claimant by Dr. John Swicegood (a pain management specialist) for his chronic pain.

On August 7, 2003, the claimant was again seen by Dr. Evans. At that time, Dr. Evans continued to note a full range of motion of the claimant's left shoulder and only indicated that anterior apprehension tests again caused the claimant some pain in his left shoulder. The posterior

apprehension and sulcus test remained negative. Dr. Evans also observed that the claimant exhibited “several trigger points,” in the thoracic and interscapular area. He directed the claimant to continue his physical therapy. He again mentioned his referral of the claimant for a psychoneurological evaluation by Dr. Brown, ophthalmologic evaluation by Dr. Greer, a neurosurgical evaluation by Dr. Armstrong, and a chronic pain management evaluation by Dr. Swicegood.

On September 8, 2003, the claimant underwent the neuropsychological evaluation by Dr. Douglas Brown, as recommended by Dr. Evans. Following his evaluation, Dr. Brown made the following diagnoses:

“Cognitive disorder, not otherwise specified, likely secondary to closed head injury.

There is evidence of memory deficits in testing.

Major depression, single episode. Moderate to severe.

Characteristics of passive aggressiveness.”

Dr. Brown recommended treatment of the claimant’s depression by the use of antidepressant medication and cognitive retraining for the claimant’s memory deficits.

For some reason, the claimant was also evaluated by Dr. Christopher Greer, an ophthalmologist, at the request of Dr. Evans. This evaluation took place on September 11, 2003, Dr. Greer recorded a history that the claimant was involved in a truck driving accident the prior year and sustained a closed head injury. He also recorded complaints of blurry vision and headaches. Finally, he notes that the claimant related that he had a “pinched nerve” at the base of his head on both sides of his skull. There is no indication in the reports of Dr. Greer that he found evidence of any injuries to the claimant’s visual system. Nor is there any indication that the claimant required any ophthalmologic treatment. In fact, Dr. Greer notes that the claimant has no restrictions, whatsoever, from an ophthalmologic standpoint.

The claimant returned to see Dr. Evans on September 18, 2003. At that time, Dr. Evans observed that the claimant was continuing with his physical therapy and was awaiting his recommended neurosurgical evaluation. He also noted that Dr. Greer had opined that no specific

ophthalmological “recommendations” were necessary. At this visit, Dr. Evans instituted Elavil for the claimant’s chronic pain.

The claimant was next seen by Dr. Evans on October 30, 2003. At that time Dr. Evans noted that the claimant was not able to tolerate the Elavil and had discontinued it. He further noted that the claimant had still not been able to obtain a neurosurgical evaluation, but was now scheduled to see Dr. Queeney (a neurosurgeon). He recorded that the claimant was also requesting a return visit with Dr. Keating, because he has had a “return” of his occipital headaches. Dr. Evans stated that his diagnosis of the claimant’s complaints remained unchanged and that he was to remain off work and continue his current conservative treatment modalities.

The claimant’s next visit with Dr. Evans was on December 11, 2003. At that time, Dr. Evans noted that the claimant was experiencing a worsening of his occipital headaches, but had not been approved to return to Dr. Keating for another injection. Dr. Evans recorded that on his physical examination of the claimant, the claimant continued to display a full range of motion in his left shoulder and that all tests performed on this shoulder were negative. The only abnormal finding that he recorded, which would be subjective in nature, was a continuing tenderness in the interscapular area of the claimant’s thoracic spine. Dr. Evans indicated that he would set the claimant up with the antidepressant therapy that was recommended by Dr. Brown and would refer the claimant for “cognitive retraining” by Dr. Patricia Walz. He also noted the claimant was now to be seen by Dr. Anthony Capocelli (a neurosurgeon) because of Dr. Capocelli’s expertise in matters involving the thoracic spine. He directed the claimant to remain off work, until his next visit.

The claimant was again seen by Dr. Keating on January 12, 2004. Somewhat contrary to Dr. Evans observation, in his note of 2003, that the claimant had experienced only “some relief” with the prior injection, Dr. Keating recorded that the claimant had significant and almost immediate relief with the prior injection and had remained “headache free” for four or five months after it was performed. She recorded a history that the claimant’s headaches did not return until August of

2003. She noted that the claimant was currently complaining of some mild headaches about once or twice per week and more severe headaches once or twice a month. Her physical examination of the claimant again showed the claimant to be neurologically “stable.” In regard to her diagnosis and recommended treatment, Dr. Keating stated:

“1. Left occipital neuralgia. The claimant was injected with one cc of Marcaine and 20 mg. of Depo-Medrol into the region of the left greater occipital nerve. The patient tolerated this well.

2. Episodic migraine. The patient does have a long history of migraine headaches predating his concussion and head injuries. He has continued to have episodic migraine as well as admixed, migraine type headaches. We will treat him with Imitrex on an abortive basis. We will start with 100 mg. tablets. I have given him instructions on how to take that. At this time, he does not really want a prophylactic medication. If his headaches increase in frequency however, I think we will need to consider that. I will probably choose Depakote or a low dose of Zonegran or Topamax for him.

3. We will see him back on an as needed basis. Again, I have done an occipital nerve injection on him today and have given him some Imitrex samples as well as a prescription for the Imitrex 100 mg. tablets trial on an as needed basis.” (Emphasis mine)

The claimant was then seen by Dr. Evans, on January 28, 2004. At that time, Dr. Evans noted that the respondents had not set the claimant up for the antidepressant therapy, the chronic pain management therapy, or the cognitive retraining. He further noted that the claimant was still awaiting an evaluation by Dr. Capocelli. He observed that the claimant had been seen by Dr. Keating and that an injection had been given (as well as “chronic medication”). However, he does not note if the injection provided the claimant with any noticeable relief. In regard to his physical examination of the claimant, Dr. Evans indicated that it remained unchanged from previous examinations. In his opinion, the claimant continued to experience left shoulder instability and thoracic and interscapular muscle pain. Dr. Evans directed the claimant to continue the medication that he had previously prescribed. He directed the claimant to remain off work and to return for follow up in six weeks.

This follow up visit with Dr. Evans occurred on March 11, 2004. At that time, Dr. Evans noted that the claimant had still not been evaluated for his antidepressant medication or his cognitive

retraining. He did note that the claimant “seems to be getting better” with his headaches, after the injection by Dr. Keating. Finally, he noted that the claimant had been evaluated by Dr. Capocelli, but that Dr. Capocelli did not feel that any surgical intervention was indicated and merely recommended that the claimant continue his physical therapy for the thoracic and interscapular pain. Dr. Evans again noted that the claimant’s physical examination remained unchanged. He continued in his diagnosis of left shoulder anterior instability and thoracic and interscapular muscle pain. He directed the claimant to continue his medication and current treatment programs and to return for follow up in six weeks.

On June 7, 2004, the claimant was evaluated by Dr. Reginald Rutherford (a neurologist) at the respondents’ direct request. In his report, Dr. Rutherford indicates that he personally evaluated the claimant and reviewed the claimant’s prior medical records (including all test results). During this examination, Dr. Rutherford recorded a history from the claimant of a temporary paralysis of his legs following the motor vehicle accident. This is the first mention of these symptoms. Dr. Rutherford also noted that the claimant was complaining of pain in his left shoulder, impaired sensation of the left upper posterior thorax, shooting pain mid posterior left thorax, neck stiffness, occasional left sided headache, and poor memory. As a result of his evaluation, Dr. Rutherford opined that the claimant had not experienced any significant orthopaedic or musculoskeletal trauma. It was his further opinion that the claimant had achieved maximum medical improvement in regard to his musculoskeletal complaints, and that no further active treatment for these complaints was necessary. Finally, he opined that there was no recommended permanent impairment rating for these complaints. However, he did recommend a SPECT scan of the claimant’s brain and a neuropsychological evaluation by Dr. Judy White Johnson (a neuropsychologist) to further investigate the possibility of the existence of any traumatic brain injury, as the result of the claimant’s motor vehicle accident. Upon receipt of this report, the respondents terminated the claimant’s temporary total disability benefits and refused to pay for any further medical treatment by and at the direction of Dr. Evans.

Following the termination of his benefits, the claimant returned to Dr. Evans on July 13, 2004. At that time, Dr. Evans noted that the claimant continued to complain of thoracic pain, neck pain, and periodic headaches. He stated that these complaints “will be a chronic issue.” He further noted complaints, in the form of popping in the claimant’s shoulder, which he stated had been present for “quite some time.” He recommended an exploratory arthroscopy of the claimant’s left shoulder to ascertain the etiology of these complaints and “to fix whatever problem presents itself at that surgery.” Finally, he stated that he was instituting treatment of the claimant’s diagnosed depression by the use of antidepressant medication.

On July 29, 2004, the SPECT brain scan, which was recommended by Dr. Rutherford, was performed. This study was interpreted by the radiologist, Dr. James E. McDonald, and by Dr. Rutherford as being “normal” and as not showing any indication of any damage due to a traumatic brain injury.

On August 18, 2004, the claimant was evaluated by Dr. Judy White Johnson, as recommended by Dr. Rutherford. At the time of her evaluation, Dr. Johnson recorded the following statements by the claimant concerning his injuries and difficulties:

“Mr. Drumm said that the hospital (Desert Valley Hospital) recommended that he stay but workers’ comp would not allow it.”

“He added his doctors have told him that he has received treatment too late for them to help. He said Dr. Capocelli had told him his muscles ‘had rehealed wrong’.”

“He reported that two weeks following the accident, he had no use of his left arm and sought treatment from Dr. Taylor in Stilwell, Oklahoma. He complained that the doctor did not do any examination or x-ray and referred him for ‘off the wall physical therapy’. He said Dr. Taylor wanted him to return to work even though he was unable to use his left arm. “

” He reported that Dr. Evans performed a variety of tests and found a ‘slight spinal injury’ and another doctor told him he has headaches because of a ‘stripped nerve in my neck’. Then he was seeing a physical therapist who found the right side ‘of my back was a different color’ and this reflects a ‘sensory injury’.”

Dr. Johnson also reported that the claimant believed he had experienced a "torn rotator cuff."

After her evaluation of the claimant, Dr. Johnson expressed the opinion that the claimant did have substantial psychological difficulties. However, it was her further opinion that these psychological difficulties were not the result of any traumatic brain injury from the employment related motor vehicle accident on May 2, 2002.

In a report dated August 24, 2004, Dr. Rutherford stated that "after review of the claimant's CT scan and Dr. Johnson's report," was his expert opinion that there is no evidence to even "suggest" that the claimant sustained a traumatic brain injury in the motor vehicle accident of May 2, 2002. He made no change in regard to his opinion concerning the claimant's other complaints.

Finally, on September 16, 2004, Dr. Brown wrote a narrative report to the claimant's attorney. In this report Dr. Brown was critical of the findings of Dr. Johnson and Dr. Rutherford. He stated that he believes these individuals were intentionally "reporting data in a way favorable to the insurance carrier."

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove by the greater weight of the credible evidence that he has continued within his healing period from the effects of any of his "compensable injuries" after June 24, 2004. In fact, the greater weight of the credible evidence shows that by that date any physical injury or damage that was produced by the employment related accident had resolved or at least stabilized at a level where nothing further in the way of medical treatment or the passage of time offered a reasonable expectation of improvement.

The aforementioned medical evidence shows that over the 2 ½ years following the claimant's motor vehicle accident, he has voiced a multitude of subjective symptoms and complaints, which have involved numerous different portions of his anatomy. During this period and with the help of Dr. Evans, the claimant has undergone numerous and extensive testing and has been evaluated by specialists in almost every area of medicine. These various and extensive tests and evaluations have shown little or no objective evidence of the actual presence of any physical injuries

or defects to support the claimant's vast array of significant subjective complaints.

The evidence also shows that for over two years the claimant has received almost continuous medical treatment for his extensive subjective complaints. These treatment modalities have included various oral medications and various forms of physical therapy to the numerous affected portions of his anatomy. According to the medical evidence and the claimant's testimony, none of this treatment has provided any substantial or lasting relief of these extensive subjective complaints. The medical record also show that when one of the claimant's symptomatic areas seem to improve or resolve, a new complaint appears or an old complaint that had previously improved begins to worsen.

Clearly, most of the claimant's initial injuries or complaints appear to have long since totally resolved. These include his complaints with the right side of his lower back, his right wrist, his right leg, his chest, and his abdomen. Thus, the claimant has not remained within his healing period from the effects of these injuries or complaints after June 24, 2004.

In regard to the claimant's cervical and thoracic spine complaints, the evidence shows that Dr. Anthony Capocelli (a highly qualified neurosurgeon) did not find any injury or defect to these portions of the claimant's anatomy that would require any type of surgical intervention. This would not be surprising in light of the numerous essentially negative test results and the repeated normal physical examinations performed on this portion of his body. While Dr. Evans indicates that Dr. Capocelli was of the opinion that additional physical therapy to these portions of his body could be of benefit, the medical records show that the claimant had been provided with such treatment by Dr. Evans for over 2 years with little or no apparent relief of the claimant's continuing subjective complaints in these areas. At this point, further conservative treatment for a soft tissue injury that occurred some 2 ½ years ago would no longer continue to have any reasonable expectation of offering any improvement in the physical damage caused by the compensable injuries or even in providing any symptomatic relief. Thus, it would appear that any physical damage to the claimant's cervical or thoracic spine had resolved or at least stabilized and nothing further in the way of time

or medical treatment could be reasonably expected to provide improvement by June 24, 2004.

The record reveals that the claimant's difficulties, in the form of headaches, were originally diagnosed as due either to an occipital neuralgia or to simple migraines. The injections provided by Dr. Keating were both diagnostic and therapeutic. The evidence is somewhat contradictory concerning the beneficial effect of these injections. However, they clearly did not resolve the claimant's difficulties, as Dr. Keating expected, if his headaches were attributable to an occipital neuralgia. In Dr. Keating's most recent report, it is apparent that she is now of the opinion that these headaches are likely migrainal in nature. In her most recent report, she recommended prophylactic treatment for migraines, which the claimant declined. Regardless, in this most recent report (January 12, 2002), Dr. Keating discharged the claimant from follow up care with directions to return only on an "as needed basis," Thus, the evidence fails to show that the claimant's healing period from the effects of these particular difficulties (whatever their origin) continued beyond June 24, 2004.

The next difficulties to address concerns the claimant's alleged brain "injury." There was no stipulation by the respondents that the claimant sustained such an injury in the motor vehicle accident on May 2, 2002. The only arguably "objective" evidence of the existence of any physical injury or damage to the claimant's brain (whether from the motor vehicle accident or otherwise) is the abnormalities noted by Dr. Brown in the neuropsychological tests he performed. Not only are the findings of Dr. Brown contradicted by the findings of Dr. Johnson, but the greater weight of the credible evidence fails to show that the claimant actually sustained any physical trauma or injury to his brain in the employment related motor vehicle accident. As previously noted, there is no mention of any complaints involving his head or brain during his initial hospitalization, There is also no indication, in these initial records, of any sign of trauma to the claimant's head or brain (i.e. bruising, abrasions, swelling, etc. involving the claimant's head). Subsequent radiographic studies have failed to show any evidence of physical injury or damage to the claimant's brain. It must also be noted that, except for the claimant's periodic complaints of memory loss, none of the various

medical doctors (two of which were neurologists) noted any signs of physical brain damage. Further, it must be noted would observe that the claimant exhibited no indication of memory deficits or loss during his testimony. This evidence all clearly supports the opinion of Dr. Johnson. This evidence would further prevent a finding of an employment related injury to the claimant's brain, which would be supported by "objective findings," Watson v. Tayco, Inc. 79 Ark. App. 250 (2002). Thus, I find that the claimant's alleged brain "injury" cannot be properly considered in determining whether he has continued within his "healing period" from the effects of his compensable injuries after June 24, 2004.

The claimant's only remaining physical difficulties are those involving his left shoulder. The claimant has been treated for this injury for over 2 years without any apparent benefit. Clearly, the claimant would be expected to have received the maximum benefit of conservative treatment within this time, and any soft tissue injury would be reasonably expected to have resolved or stabilized within this time. In his most recent report, Dr. Evans has now recommended exploratory and possibly corrective surgery for the claimant's left shoulder. It is apparent from Dr. Evans' most recent report that he is not convinced that he will actually find anything to surgically correct during this recommended exploratory procedure. In fact, it would appear from the other medical evidence presented that the possibility of finding anything requiring surgical correction is remote. The numerous radiographic studies performed on the claimant's left shoulder have shown no evidence of any defect that would merit surgical intervention. The records of Dr. Evans indicate that the claimant has continuously exhibited a full range of motion in his left shoulder on almost all of his numerous physical examinations. It is curious to note that Dr. Evans indicates, in his narrative report to claimant's attorney, dated July 13, 2004, that the claimant has displayed "popping" in his left shoulder "which has been present there for quite some time." However, the only prior mention by Dr. Evans during his numerous previous examination, of this type of abnormality is in his handwritten notation of May 21, 2003, wherein he notes mild "crepitus." Dr. Evans has had over 2 years to evaluate and treat the claimant, but only recommended the exploratory surgery after Dr.

Rutherford opined that the claimant required no further treatment for his left shoulder complaints and the respondents terminated the claimant's benefits.

I simply do not find that Dr. Evans' current recommendation for an exploratory arthroscopy of the claimant's left shoulder represents a substantial basis to conclude that the physical damage to the claimant's left shoulder had not resolved or stabilized by June 24, 2004, but reasonably required further active medical treatment. Thus, I do not find that this opinion is a sufficient basis to find that the claimant's healing period from the effects of his compensable shoulder injury continued beyond June 24, 2004.

The only remaining matter is the claimant's diagnosed depression. Again, the respondents have not stipulated that this psychological condition is compensable. For the same reasons, which will be set out later in this Opinion, I did not find the depression diagnosed by Dr. Brown to be a "compensable" mental injury under Ark. Code Ann. §11-9-113. Thus, it cannot support an award of temporary total disability benefits. However even if this mental condition was "compensable," the maximum period of disability it would support had ended prior to June 24, 2004.

As the claimant has failed to prove by the greater weight of the credible evidence that he continued within his healing period from the effects of any of his "compensable injuries" after June 24, 2004, he cannot be awarded continuing temporary total disability benefits after that date. His claim for such benefits must be denied.

II. ADDITIONAL MEDICAL SERVICES

_____The final issue concerns the claimant's entitlement to additional medical services. The burden rests upon the claimant to prove that any additional medical services represent "reasonably necessary medical services" for the compensable injuries he sustained in the motor vehicle accident on May 2, 2002.

In order to constitute "reasonably necessary medical services," the medical services in question must be necessitated by or connected with a compensable injury. Further, these medical services must have a reasonable expectation of accomplishing the purpose or goal for which they

are intended.

As previously noted, Dr. Evans has had over 2 years to treat the claimant for his numerous complaints. During this period of time Dr. Evans seen the claimant almost monthly and has provided the claimant with continuous oral medication (which appear to be in the form of anti-inflammatories, pain medication, and possibly muscle relaxants). He has also had the claimant undergo extensive and seemingly, continuous physical therapy to various portions of his body. From the evidence presented, including the claimant's testimony, it appears that this extensive and prolonged course of treatment has provided little or no significant relief of the claimant's vast array of subjective complaints.

Clearly, the treatment modalities employed by Dr. Evans would be those commonly recognized as being appropriate for the treatment of the musculoskeletal ligamentous injuries diagnosed. However, the repeated lack of any real success of these treatment modalities make it highly unlikely that their continued use, after this extended period of time, would have any greater likelihood of success than that previously demonstrated. Thus, any continuation of these conservative treatment modalities would no longer have a reasonable expectation of accomplishing their intended purpose or goal and would not represent "reasonably necessary" medical services, under Ark. Code Ann. § 11-9-508.

The medical evidence shows that Dr. Evans has evaluated and examined the claimant on everyone of his numerous visits, over his 2 years course of treatment. During this time, he has also had various tests performed on the claimant's left shoulder. However, no exploratory arthroscopy of the claimant's left shoulder was recommended until after the claimant's benefits had been terminated. Dr. Evans reluctance to recommend such an invasive procedure would clearly be supported by the essentially negative findings on his numerous physical examinations and by the various diagnostic tests he has had performed on the claimant's left shoulder joint. As previously indicated, I find that the greater weight of the evidence shows that the likelihood that the claimant has any surgical correctable defect in the left shoulder is not sufficient to support a finding that he

continued within his healing period from the effects of this compensable injury after June 24, 2004. However, I cannot say that this likelihood is so low as to make the diagnostic aspect of the recommended exploratory arthroscopy unreasonable. This procedure is commonly used in cases that have not responded to conservative treatment, in order to totally eliminate or rule out any remaining treatable physical injury or damage.

Thus, I find that this recommended arthroscopic procedure is both necessitated by the claimant's compensable left shoulder injury and has a reasonable expectation of accomplishing at least one of the purposes or goals for which it is intended. As such, it would represent "reasonably necessary medical services" within the meaning of Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the respondents would be liable for the expense of this service, subject to the medical fee schedule established by this Commission.

The medical evidence shows that Dr. Evans has also recommended "cognitive retraining" for the claimant's alleged "brain" injury. However, as previously stated, the claimant has failed to show that he actually sustained a compensable physical injury to his brain in the employment related accident on May 2, 2002. Thus, this recommended cognitive retraining would not be necessitated by or connected with a compensable injury, and not represent "reasonably necessary medical services" within the meaning of the Act. The respondents cannot be held liable for the expense of these recommended services.

Dr. Evans has also recommended that the claimant undergo a course of chronic pain management for his admittedly compensable neck or cervical spine complaints and possibly his thoracic spine complaints. While the claimant may have some degree of chronic pain in these areas, it would not appear to be of sufficient magnitude to require the services of chronic pain management specialist. The claimant indicated that he was able to mow his yard, do some housekeeping chores, and fish. During the hearing, he exhibited no particular difficulties with chronic pain. While the claimant testified that he had seen previously seen Dr. Swicegood and Dr. Lennington (both chronic pain management specialists) no reports or records from these physicians

have been tendered. Finally, the results of the claimant's numerous physical examinations and various test results also fail to demonstrate the presence of any physical damage or defect sufficient to reasonably be expected to produce chronic pain symptoms of a magnitude that would require intervention by a chronic pain specialist.

The claimant has simply failed to prove that these services would have a reasonable expectation of producing any benefit for his pain complaints. Thus, treatment by a chronic pain management specialist would not represent reasonably necessary medical services for the claimant's compensable injuries.

Dr. Evans, based upon Dr. Brown's recommendation, has also referred the claimant for "cognitive retraining." The necessity of these services is based solely on Dr. Brown's conclusion that the claimant is experiencing "cognitive dysfunction" due to physical brain damage sustained in the motor vehicle accident of May 2, 2002. As previously stated, the respondents have not stipulated to such a compensable injury, and the claimant has failed to prove that he sustained such an injury in the accident of May 2, 2002. Thus, any medical services necessitated by this diagnosed injury or condition would not be necessitated by or connected with a "compensable injury" and would not represent "reasonably necessary medical services" within the meaning of the Act. The expense of these services cannot be held to be the liability of the respondents' herein.

The final matter concerns Dr. Evan's and Dr. Brown's recommendation of treatment for depression. Again, such a compensable mental injury or condition was not stipulated to by the respondents. Thus, the claimant has the burden of proving this condition to be "compensable" under Ark. Code Ann. § 11-9-113.

Under this subsection the claimant must prove various specific requirement for this condition to be "compensable." One of these requirements is that these mental difficulties must be causally relate to a compensable physical injury. I find this requirement to be dispositive of this issue.

Dr. Brown opined that the claimant's depression was longstanding (i.e. more than six months). For some reason he assumed that this depression did not appear until after the May 2, 2002 motor vehicle accident. In his report of September 8, 2003 Dr. Brown stated:

"I suspect this (the depression) has been present for the past year or so, once he (the claimant) began having increasing difficulties after the accident." (Emphasis mine)

Clearly, neither Dr. Evans or any other physicians that evaluated the claimant prior to Dr. Brown, are psychiatrists or psychologists. However, they are medical doctors and obviously have some knowledge of depression. Yet, none of these physicians, particularly Dr. Evans, made mention of any signs of depression, prior to the diagnosis by Dr. Brown.

It must also be noted that, after the claimant's initial evaluation at the emergency room in California, the claimant's complaints have wandered around his anatomy. However, there is no evidence of any reported significant increase in any of these difficulties, once they appeared. According to his testimony, almost all of his complaints have been present since very shortly after his accident and have continued to remain severe and debilitating.

It would also appear that Dr. Brown is primarily attributing the claimant's depression to the effects of his cognitive disorder, which he assumes was the result of a closed head injury that occurred in the motor vehicle accident on May 2, 2002. As previously indicated, the greater weight of the credible evidence fails to show that the claimant actually sustained a "closed head injury" in this motor vehicle accident or that his cognitive disorder was causally in any way related to this accident. The greater weight of the credible evidence supports the conclusion that this cognitive disorder was unrelated to and pre-existed the claimant's motor vehicle accident on May 2, 2002. Thus, any causal role that the claimant's cognitive disorder played causing regard to his diagnosed depression would not make this depression "compensable."

I find that Dr. Brown's opinion that any depression the claimant may be experiencing is the result of difficulties from a "compensable" physical injury sustained in the accident of May 2, 2002, is not supported by the greater weight of the other evidence presented. Thus, his opinion is not

sufficient to establish this required causal relationship. I find that , the depression, diagnosed by Dr. Brown, would not represent a “compensable” mental injury, within the meaning of Ark. Code Ann. §11-9-113, and treatment for this condition would not represent “reasonably necessary medical services” within the meaning of the Act. The respondents cannot be held liable for the expense of these services.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers’ Compensation Commission has jurisdiction of this claim.
2. On May 2, 2002, the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On May 2, 2002, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$234.00 for total disability and \$175.00 for permanent partial disability.
4. On May 2, 2002, the claimant sustained various compensable injuries, including compensable injuries to his neck or cervical spine and to his left shoulder.
5. The claimant has failed to prove that he sustained a physical injury to his brain on May 2, 2002.
6. The claimant has also failed to prove the existence of a causal connection between any depression which he may have been or may be experiencing and any compensable physical injury that he sustained in the employment related motor vehicle accident on May 2, 2002. Thus, this depression would not represent a compensable mental injury, within the meaning of Ark. Code Ann. §11-9-113.
7. The claimant has failed to prove by the greater weight of the credible evidence that he is entitled to continued temporary total disability benefits from June 24, 2004 through a date yet to be determined. Specifically, he has failed to prove by the greater weight of the credible evidence that he continued within his healing period from the effects of any of his compensable injuries, after that date.

8. The claimant has failed to prove that any continuing conservative treatment or periodic follow up visits with Dr. Evans for any of his compensable injuries, represent reasonably necessary medical services, within the meaning of Ark. Code Ann. § 11-9-508. Specifically, he has failed to prove that such continuing services would have a reasonable expectation of successfully accomplishing their intended purpose.
9. The claimant has failed to prove by the greater weight of the credible evidence that the cognitive retraining, recommended by Dr. Brown and Dr. Evans, represents reasonably necessary medical services, within the meaning of Ark. Code Ann. § 11-9-508. Specifically, he has failed to prove that such recommended services are necessitated by or are connected with any compensable injury that he sustained in the motor vehicle accident on May 2, 2002.
10. The claimant has failed to prove that any medical services for his diagnosed depression, recommended by Dr. Brown and Dr. Evans, represent reasonably necessary medical services, within the meaning of Ark. Code Ann. § 11-9-508. Specifically, the claimant has failed to prove that his diagnosed depression represents a “compensable” mental injury, within the meaning of Ark. Code Ann. § 11-9-113. Thus, these services would not be necessitated by or would be connected with a “compensable injury.”
11. The claimant has failed to prove by the greater weight of the credible evidence that the chronic pain program, recommended by Dr. Evans, represents reasonably necessary medical services, within the meaning of Ark. Code Ann. § 11-9-508. Specifically, he has failed to prove by the greater weight of the credible evidence that such services are reasonably required by any of his compensable injuries or would have a reasonable expectation of accomplishing any purpose or goal connected with his compensable injuries.

12. The claimant has proven by the greater weight of the evidence that the diagnostic exploratory arthroscopy of his left shoulder, recommended by Dr. Evans, does represent reasonably necessary medical services within the meaning of Ark. Code Ann. § 11-9-508. Specifically, he has proven that such medical services are medically appropriate to insure an absolutely accurate diagnosis of the nature and extent of his compensable left shoulder injury and has a reasonable expectation of accomplishing this purpose.
13. The respondents have controverted the claimant's entitlement to any temporary total disability benefits after June 24, 2004, and his entitlement to any further medical treatment after July 13, 2004.
14. As no controverted indemnity benefits have been awarded to the claimant, the claimant's attorney cannot be awarded a fee for his services.

ORDER

The respondents shall be liable for the expense of the diagnostic exploratory arthroscopy recommended by Dr. Evans. This liability is subject to the Commission's medical fee schedule.

For the reasons heretofore stated in this Opinion, the claimant's request for the payment of expenses incurred for continuing conservative treatment and periodic routine follow up visits with Dr. Evans, after July 13, 2004, should be and hereby is denied. However, this does not apply to a reasonable period of follow up by Dr. Evans after the arthroscopic procedure herein awarded.

For the reasons heretofore stated in this Opinion, the claimant's request for the payment of any continued physical therapy after July 13, 2004, should be and hereby is denied.

For the reasons heretofore stated in this Opinion, the claimant's request for cognitive retraining should be and hereby is denied.

For the reasons heretofore set forth in his Opinion, the claimant's request for the payment of expenses incurred for treatment of his diagnosed depression, should be and hereby is denied.

For the reasons heretofore stated in this Opinion, the claimant's request for continuing

temporary total disability benefits, from June 25, 2004 through a date yet to be determined, should be and hereby is denied.

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.

MICHAEL L. ELLIG
Administrative Law Judge