

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F310381/F405087

WILLIAM MILNER

CLAIMANT

PENSKE LOGISTICS, INC.

RESPONDENT

OLD REPUBLIC INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JANUARY 27, 2006

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

Claimant represented by CONRAD ODOM, Attorney, Fayetteville,
Arkansas.

Respondents represented by CURTIS NEBBEN, Attorney, Fayetteville,
Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claims on November 14, 2005, in Springdale, Arkansas. A pre-hearing order had been entered in this case on December 7, 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. Immediately prior to the commencement of the hearing, certain clarifications, in regard to dates, were made to both the stipulations and the issues. A copy of the pre-hearing order with these amendments noted thereon, was made Commission's Exhibit No. 1 to the hearing.

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

1. On all relevant dates, including September 9, 2003 and April 20, 2004, the relationship of employee-employer-carrier existed between the parties.

2. The appropriate weekly compensation rates are the statutory maximum.
3. On September 9, 2003 and April 20, 2004, the claimant sustained compensable injuries to his left shoulder and on April 20, 2004 to his head.
4. There is no dispute over any benefits for the compensable injuries to the claimant's left shoulder.
5. There is no dispute over medical expenses for the claimant's compensable injury to his head, except those incurred for the services of Dr. Gene Chambers.
6. There is no dispute over the payment of benefits for temporary total disability prior to June 22, 2004.

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

1. whether the services provided and recommended by Dr. Gene Chambers represented reasonably necessary medical services for the claimant's compensable head injury.
2. The claimant's entitlement to continued temporary total disability benefits for his compensable had injury from June 22, 2004 through December 9, 2004.
3. Appropriate attorney's fees.

In regard to these issues, the claimant contends:

"(a) The claimant contends that he sustained a compensable injury on 9/10/03 when his truck rolled over.

(b) Claimant further contends that he sustained a second compensable injury on 4/20/04 re-injuring his right (sic) shoulder which was injured in the 9/10/03 accident as

well as hitting his head and other injuries.

(c) Claimant's treating physician is Dr. Davis.

(d) That the claimant's authorized treating physician, Dr. David Davis, has referred the claimant to Dr. Chambers for cognitive rehabilitation and that that amount has been controverted.

(e) Claimant remains off work under the doctor's care and is entitled to temporary total disability benefits."

In regard to these issues, the respondents contend that the recommended treatment by Dr. Chambers "does not arise out of the compensable injury."

DISCUSSION

I. LIABILITY FOR THE EXPENSE OF SERVICES, IN THE FORM OF NEUROPSYCHOLOGICAL EVALUATIONS AND PSYCHOLOGICAL COUNSELING AND/OR COGNITIVE RETRAINING.

The first issue to be addressed concerns liability for the expenses incurred as the result of neuropsychological evaluations of the claimant by Dr. Gene Chambers, and for psychological counseling or therapy, in the form of cognitive retraining. Although the pre-hearing order mentions only Dr. Chambers, the medical records and the deposition of Dr. Chambers show that the psychological services, in the form of cognitive retraining, was actually provided by an associate of Dr. Chambers (a Dr. Anne Stevens) and by members of his staff (primarily a Stevie Wood).

In order to be entitled to these services, at the respondents' expense, the claimant must prove that these services represent "reasonably necessary medical services" within the meaning of Ark.

Code Ann. §11-9-508. In order to meet this burden, the claimant must prove that these services were necessitated by or connected with his compensable head injury and had a reasonable expectation of accomplishing the purpose or goal for which they were intended.

The evidence presented shows that the claimant experienced trauma to his head in both the employment related accidents of September 9, 2003 and April 20, 2004. This evidence further shows that the accident and injury on September 9, 2003, also resulted in trauma to the claimant's head and a loss of consciousness for a significant period of time.

The claimant was treated for his admittedly compensable head injury or injuries by Dr. David Davis, a neurologist. Various tests were performed on the claimant, at the direction of Dr. Davis and other physicians. These tests include two CT scans, an MRI, and an EEG. All of this testing was essentially negative. In his report of May 27, 2004, Dr. Davis recommended a neuropsychological evaluation of the claimant. The respondents refused to accept liability for this recommended evaluation or any of the subsequent services provided for the claimant's cognitive difficulties.

In his report of June 22, 2004, Dr. Davis opined that the claimant had achieved the maximum benefit of time and medical treatment, in regard to the physical aspect of his compensable head injury. However, he noted that the claimant would likely continue to indefinitely require medication for chronic headaches from his compensable head injury (to be provided by the claimant's family physician, Dr. Johnny Adkins), and also continued to need

neuropsychological testing or evaluation for the mental or psychological difficulties from his compensable head injury.

The claimant ultimately received the recommended neuropsychological testing and/or evaluation by Dr. Chambers, on June 26, 2004. Based upon this extensive neuropsychological testing, it was the expert opinion of Dr. Chambers that the claimant was experiencing a post-concussion disorder with post-concussion headaches and depression. He attributed all of these conditions to the claimant's employment related head trauma. For these difficulties, Dr. Chambers recommended:

- “1. Participation in a cognitive rehabilitation program could assist in the recovery from his post-concussive disorder in terms of speeding the recovery rate as well as accommodating the strength of the recovery.
2. Medication reviewed to assist the impact on his depression might prove beneficial.
3. Supportive counseling in terms of coping and dealing with his current cognitive losses could be beneficial, as well.”

The evidence reveals that the services recommended by Dr. Chambers were subsequently provided to the claimant by Dr. Stevens (an associate of Dr. Chambers) and by appropriate clinical staff. Both the medical evidence and the testimony of the claimant show that the services provided by Dr. Chambers, Dr. Stevens, and the staff at Mindworks clearly accomplished the purposes for which these services were intended. The nature and extent of the claimant's compensable head injury was accurately determined, and appropriate program of treatment was formulated, the claimant's

memory and cognitive difficulties substantially improved, the frequency and intensity of his chronic headaches were significantly decreased, and his depression appears to have resolved.

_____After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence shows that the claimant's mental difficulties, which necessitated the services provided by and at the direction of Dr. Chambers and Dr. Stevens, were causally related to the claimant's admittedly compensable head injury or injuries. Although the claimant may have had pre-existing "learning difficulties" and may have been functioning at a lower intellectual level, there is no evidence that he was experiencing any of the described short-term memory difficulties, prior to his employment related injuries. There was also no evidence that the claimant was experiencing chronic headaches prior to these injuries. Although the claimant does have a prior history of depression, there is no evidence that he was experiencing any symptoms of depression at the time of his various employment related motor vehicle accidents.

Both Dr. Davis and Dr. Chambers have related these difficulties that necessitated the evaluation by Dr. Chambers and the subsequent treatment by Dr. Stevens to the claimant's employment related head injury or injuries. There is no expert medical evidence to the contrary.

Clearly, the trauma described by the claimant, as occurring in the two employment related motor vehicle accidents, could have reasonably caused these particular difficulties. These particular

difficulties first manifested themselves within a reasonable period of time following the trauma to the claimant's head from these two employment related incidents. Finally, there is no other reasonable explanation for appearance of these difficulties at that particular time.

In summary, it is my opinion that the greater weight of the evidence proves that the services provided the claimant by and at the direction of Dr. Chambers and Dr. Stevens for the claimant's cognitive disorder were necessitated by or connected with his admittedly compensable head injury or injuries. I further find that the greater weight of the credible evidence shows that these services were medically appropriate and reasonable in order to accurately ascertain the nature and extent of the claimant's head injury and to improve or alleviate the various symptoms and complaints that this injury was producing. The evidence shows that the services provided were not only of a type or nature commonly employed by the general medical community for these purposes, but did in fact, actually accomplish the particular purposes for which they were intended.

Thus, the services provided to the claimant by and at the direction of Dr. Chambers and Dr. Stevens constitute "reasonably necessary medical services" for the claimant's admittedly compensable head injury, under Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the expense of these services is the liability of the respondents' herein. This liability is subject to the medical fee schedule established by this Commission.

II. TEMPORARY TOTAL DISABILITY BENEFITS FOR THE PERIOD OF JUNE 22, 2004 THROUGH DECEMBER 9, 2004

The remaining issue concerns the claimant's entitlement to temporary total disability benefits for the period beginning June 22, 2004 and continuing through December 9, 2004. In order to be entitled to such benefits, the claimant must prove that he continued within his healing period from the effects of one or more of his compensable injuries during this time and was also rendered totally disabled by the effects of this compensable injury or injuries.

The duration of the healing period is a medical question, which must be resolved on the basis of the greater weight of the medical evidence presented. Applicable case law provides that the healing period continues until the claimant has achieved the maximum benefit of time and medical treatment in regard to the resolution or, at least, the stabilization in the actual physical or mental damage caused by a compensable injury. The Act clearly recognizes that temporary total disability applies to both mental as well as physical injuries, although such disability for mental injuries is limited in duration. The mere continuation of symptoms or complaints, once the underlying damage has resolved or stabilized, is not sufficient to extend the healing period.

On June 22, 2004, the claimant was released from treatment by Dr. B. Raye Mitchell, an orthopaedic surgeon and the claimant's primary treating physician for his compensable left shoulder

injuries. At that time, Dr. Mitchell again assessed a permanent physical impairment of 20% to the upper extremity for the compensable injuries to the claimant's left shoulder that were sustained in the employment related motor vehicle accidents on September 9, 2003 and April 20, 2004. Dr. Mitchell further stated that from the standpoint of the claimant's compensable left shoulder injuries, the claimant was released to return to employment, including driving a truck. Thus, the claimant's admittedly compensable shoulder injuries would not be a basis for continuing temporary total disability beyond this date.

On June 22, 2004, Dr. Davis released the claimant from his treatment. He further opined that the claimant had reached maximum medical improvement from a neurological standpoint with no ratable permanent physical impairment. However, Dr. Davis recognized that the claimant continued to experience frequent headaches, dizziness, and "mentation" problems. It was his expert opinion that these problems required neuropsychological testing and possible neuropsychological treatment.

In his reports and records, Dr. Chambers expressed the opinion that continued medication, cognitive rehabilitation, and counseling were appropriate to reduce or alleviate the damage to the claimant's mental or psychological abilities caused by his compensable head injury. This opinion of Dr. Stevens was substantiated by the fact that the claimant's mental or psychological difficulties actually did improve, over time and with the recommended treatment. It was not until his evaluations on

June 27, 2005; July 18, 2005; and July 20, 2005, that Dr. Chambers opined that the claimant had likely experienced the most improvement that could be reasonably expected with time and treatment, even though he indicated that further improvement might be possible with additional cognitive rehabilitation.

The reports and records of Dr. Stevens and other personnel at his facility show that the claimant was under continuous treatment for his mental difficulties through December 17, 2004. The evidence shows that the claimant's treatment was only terminated at that time due to the respondent's refusal to provide such services and the claimant's lack of the finances to obtain these services on his own.

After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence proves that the claimant had not achieved the maximum benefit of time and medical services in the healing of his compensable head injury by December 9, 2004, even though his difficulties from this injury had improved sufficiently to allow his return to regular employment by that date. Therefore, the claimant has proven the first necessary element for his entitlement to temporary total disability benefits during the period of June 22, 2004 through December 9, 2004 (i.e. that his healing period from all of his compensable injuries had not ended by December 2004).

In his deposition, Dr. Chambers indicated that he never expressly prohibited the claimant from engaging in employment, due to his cognitive difficulties. However, he stated that these

difficulties were sufficiently severe, so as to prevent the claimant from performing his employment as a truck driver and likely in any other capacity. He stated that at the time he first saw the claimant, the claimant would have required some period of time and treatment to improve to the point where he could be reasonably expected to obtain and perform any regular employment. The reports and records of Dr. Stevens do not show that the claimant had sufficiently improved to this point until December 9, 2004.

The claimant testified that during this period, his cognitive difficulties (including his headaches and deficit in short-term memory), were sufficiently severe to prevent him from returning to work driving a truck or in any other capacity during the period of June 22, 2004 through December 9, 2004. The claimant further testified that, even when he returned to work on December 9, 2004, he continued to experience substantial memory problems, which caused him to change employments shortly thereafter. However, he testified that with a change in his employment and further improvement in his memory he had no significant difficulties with his present position. I find the claimant to be a credible witness.

After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence establishes that the claimant's compensable head injury or injuries with the resulting memory deficits and headaches prevented the claimant from performing all forms of regular gainful employment

for which he was otherwise qualified for the period of June 22, 2004 through December 9, 2004. Thus, the claimant has satisfied the second statutory requirement for his entitlement to temporary total disability benefits during this period.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On September 9, 2003 and April 20, 2004, the relationship of employee-employer-carrier existed between the parties.
3. On September 9, 2003 and April 20, 2004, the claimant earned wages sufficient to entitle him to weekly compensation rates equal to the statutory maximums in effect at that time.
4. On September 9, 2003 and April 20, 2004, the claimant sustained compensable injuries to his left shoulder and on April 20, 2004, to his head.
5. There is no dispute over any benefits for the compensable injuries to the claimant's left shoulder.
6. There is no dispute over medical expenses for the compensable injury to the claimant's head, except for those incurred for the services of Dr. Eugene Chambers and Dr. Anne Stevens.
7. The services provided to the claimant by Dr. Eugene Chambers and Dr. Anne Stevens represent reasonably necessary medical services for the claimant's compensable

head injury. Specifically, the greater weight of the credible evidence establishes that these services were necessitated by or connected with the claimant's compensable head injury and had a reasonable expectation of accomplishing the purpose or goal for which they were intended.

8. There is no dispute over the payment of temporary total disability benefits prior to June 22, 2004 and all such benefits have been paid.
9. The claimant continued to be rendered temporarily totally disabled as a result of the effects of his compensable head injury from June 22, 2004 through December 9, 2004. Specifically, the greater weight of the credible evidence proves that during this period the claimant continued within his healing period from the effects of his compensable head injury and continued to be rendered totally disabled from performing regular gainful employment as a result of this injury.
10. The respondents have controverted the claimant's entitlement to continued temporary total disability benefits after June 22, 2004 and his entitlement to the expenses incurred for the services of Dr. Chambers and Dr. Stevens.
11. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the controverted temporary total disability benefits herein awarded.

ORDER

The respondents shall pay to the claimant additional temporary total disability benefits for the period of June 22, 2004 through December 9, 2004.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on these controverted temporary total disability benefits. One-half of this fee is the obligation of the respondents in addition to such benefits. The remaining one-half of this fee is to be withheld by the respondents from such benefits.

The respondents shall also be liable for the expense incurred for the services rendered to the claimant by and at the direction of Dr. Eugene Chambers and Dr. Anne Stevens. This liability shall be subject to the medical fee schedule established by this Commission.

The respondents are also entitled to credit for any such amounts paid under a policy of group insurance. However, the respondents shall hold in reserve an amount equal to this credit for a period of five years. If releases are not obtained from the group carrier or such amounts otherwise distributed by order of this Commission, during this period, the respondents shall pay such amounts to the Death & Permanent Total Disability Bank Fund of the State of Arkansas.

All benefits herein awarded, have heretofore accrued and 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