

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F109011

ROBERT B. BOONE,
EMPLOYEE

CLAIMANT

ARKANSAS OREGON PNEUMATICS,
EMPLOYER

RESPONDENT

CONTINENTAL CASUALTY COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED NOVEMBER 2, 2007

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by the HONORABLE KENNETH E. BUCKNER,
Attorney at Law, Pine Bluff, Arkansas.

Respondents represented by the HONORABLE MICHAEL J. DENNIS,
Attorney at Law, Pine Bluff, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The claimant appeals an administrative law judge's opinion filed November 13, 2006. The administrative law judge found, among other things, that the claimant did not prove he was entitled to additional temporary total disability compensation. After reviewing the entire record *de novo*, the Full Commission affirms the opinion of the administrative law judge.

I. HISTORY

Bobby Boone, age 40, testified that he was working as a welder for Arkansas Oregon Pneumatics in June 2001. The parties stipulated that the claimant sustained a compensable shoulder injury on June 21, 2001. The claimant testified, "We were working under a V-deck and as I walked to pick a piece of metal up a log struck me between my shoulder and my neck, about right here (indicating)." An emergency room report on June 21, 2001 indicated that the claimant "was working at the mill here when suddenly a log got loose and fell over him hitting his right shoulder and knocking him down to the floor. After that, he has been having pain in the right shoulder, the right side of the neck, and the jaw." The assessment was "1. Right shoulder contusion, possible acromioclavicular separation. 2. Jaw contusion."

Respondents' Exhibit Two indicates that temporary total disability was paid the claimant beginning June 22, 2001.

Dr. Gregg Massanelli reported on August 24, 2001, "On 6/21/01 he had a log fall on his right shoulder. He eventually had an MRI, which showed that he had a supraspinatus tendonitis with a partial thickness rotator cuff tear....My plan is to do a right shoulder arthroscopy

with evaluation of rotator cuff and do an arthroscopic subacromial decompression." Dr. Massanelli performed shoulder surgery on August 24, 2001.

An MRI of the claimant's cervical spine was taken on April 5, 2002, with the impression, "Findings consistent with very minimal osteophyte formations intervertebral foramina C5-C6 level bilaterally but with no other specific bony abnormalities noted."

On May 17, 2002, Dr. Charles E. Pearce opined that the claimant was "at maximum medical improvement as it pertains to his right shoulder."

An MRI of the claimant's cervical spine was taken on May 23, 2002, with the following impression: "There is straightening of the normal cervical lordosis with multi-level regions of degenerative disk disease and broad-based bulges. There is exit foraminal narrowing for the right C5, and left C6 and C7 nerve roots."

The parties stipulated that "temporary total disability and medical benefits were paid for the shoulder through May 2002."

Dr. Pearce reported on May 23, 2002:

In regard to his shoulder, I think that he can return to his regular duties. However, he needs

an assessment by a spine or pain specialist as it pertains to his neck, prior to a full release without restriction. As far as his shoulder is concerned, I feel he is at maximum medical improvement. He has sustained zero percent permanent partial impairment....

Dr. Yeshwant P. Reddy evaluated the claimant on July 11, 2002 and gave the following impression: "1. Left trapezial trigger points. 2. Cervical degenerative disc disease with bulges causing right C5 and left C6 and C7 neural foraminal narrowing. 3. Lumbar degenerative disc disease, L3-4 to L5-S1. 4. Right shoulder decompression surgery, August, 2001." Dr. Reddy proposed a series of epidural steroid injections.

Dr. M. Carl Covey consulted with the claimant on November 6, 2002 and gave the following impression: "Patient with cervical degenerative disease, neural foraminal disease, with what may be some cervical radicular symptoms, right greater than left, but paracervical symptoms worse on the left, probably some secondary myofascial symptoms, also has degenerative spine disease lumbar, degenerative disc disease....It is quite apparent that this cervical spine disease is related to the accident. He may have had some mild degenerative disease, but now he has much more advanced disease without a history of previous injury and completely

asymptomatic before the injury." Dr. Covey's treatment plan included cervical epidural steroid injections.

A pre-hearing order was filed on March 17, 2003. The parties agreed to litigate the following issues: "1. Did claimant sustain a compensable neck injury on June 21, 2001? 2. Is claimant entitled to additional medical benefits and temporary total disability subsequent to May 2002, for the shoulder? 3. Is claimant entitled to medical treatment and temporary total disability for the neck injury? 4. Is claimant entitled to an attorney's fee?"

An administrative law judge filed an amended opinion on July 21, 2003. The ALJ found, in pertinent part:

3. The claimant sustained a compensable right shoulder injury on June 21, 2001.
4. Temporary total disability and medical benefits were paid for the shoulder injury through May, 2002, the date of claimant's final visit with Dr. Charles Pearce. Subsequent to that date, claimant was no longer in a healing period and totally incapacitate (sic) from earning wages for the shoulder injury.
5. The preponderance of the evidence reflects that the claimant sustained a compensable neck injury, but did not sustain a compensable back injury on June 21, 2001.
6. The preponderance of the evidence reflects that the claimant is not entitled to temporary total disability or medical benefits for the compensable right shoulder injury subsequent to May, 2002.
7. However, the preponderance of the evidence reflects that the claimant is entitled to medical

treatment and temporary total disability from May, 2002, until a date to be determined for the compensable neck injury of June 21, 2001 (less the days he worked.) Claimant is entitled to reasonable and necessary medical treatment from Dr. Carl Covey from the date of his request for a change of physicians from the Commission, November 27, 2002, to a date to be determined. Dr. Covey's treatment is reasonably necessary.

8. The claimant's authorized treating physician is designated by the Arkansas Workers Compensation Commission to be Dr. Carl Covey, and the claimant is entitled to reasonably necessary medical treatment from Dr. Covey from November 27, 2002.

9. The preponderance of the evidence reflects that the claimant is entitled to an attorney's fee for controversion.

There was no appeal of the administrative law judge's July 21, 2003 opinion.

Dr. Scott M. Schlesinger provided an Independent Medical Evaluation on April 9, 2004:

Mr. Boone is a 36-year-old male who was apparently hurt at work on 6/21/01 when he was hit by a log. He has had persistent problems since. He has had right shoulder surgery. He has had pain in the right shoulder. He has had neck pain and low back pain....

The MRI scan of the lumbar spine is a normal study. The MRI of the cervical spine reveals degenerative changes. There is a right-sided disc bulge and osteophyte formation at the C4-5 level. There is no neural compression associated with this, however. There is no neural compression at the C5-6 and C6-7 level. The radiologist read out bulging discs at these levels with some neuroforaminal involvement of a mild nature, but I really don't think there is any involvement of the nerves....

In this case, I see no structural explanation for the numbness in the right hand. He may have some stretching of brachial plexus nerves that cause intermitting tingling in the ulnar side. He has no physical exam findings consistent with an ulnar neuropathy of any clinical significance, so I will not pursue this further. As regards to the leg pain, I see no structural explanation and I will not pursue this further. This is only occasionally present anyway. With regards to his back and neck pain, I think this is multifactorial. If indeed his history is accurate and he had no neck or back pain prior to the injury, then it sounds like it was a soft tissue aggravation of his cervical degenerative findings. The lumbar findings are strictly musculoskeletal.

I would state with a high degree of medical certainty that no further interventions are indicated. I do not feel that any form of surgery, be it a spinal stimulator, pain pump or any form of operation, would be of any benefit to this patient's neck or back. The shoulder situation I would have to defer to Dr. Pearson and Massanelli.

With regards to the cervical spine, I would give him a permanent partial disability rating of 4% in accordance with The American Medical Association publication Guides to the Evaluation of Permanent Impairment, 4th Edition, Table 75, page 113.... There is no rating available for the lumbar spine as there are no objective findings and normal radiologic studies.

I think he should undergo a functional capacity evaluation, which we will be happy to coordinate. I will be happy to issue a final opinion about this after a FCE. I would release him to work under the stipulations of the FCE. I think he has certainly reached maximum medical improvement for the neck and back problems.

Dr. D'Orsay D. Bryant, III examined the claimant on July 22, 2004 and stated, "In summary, the patient would have 4 percent whole person impairment regarding his cervical spine, 8 percent impairment regarding the lumbar spine, and 7 percent impairment to the whole person as a result of his work related shoulder injury."

On August 23, 2005, Dr. Barry D. Baskin provided an Independent Medical Evaluation:

After review of the patient and review of the medical records, it is my opinion that this gentleman was involved in work related injury 6/21/01. A log apparently fell, by review of the record and by the patient's description, about 12 to 14 feet, brushing against the side of his head and hitting his shoulder. This gentleman has had degenerative changes on his cervical and lumbar MRI scans. He has had shoulder surgery directly as a result of his 6/21/01 injury....it is difficult to say if the degenerative changes in his cervical spine had anything to do with that injury.

I am asked to comment as to whether any additional treatments or diagnostics would be recommended. It was mentioned in the medical record that EMG would be performed based on his cervical MRI scan. I do not see that EMG was ever done. Electrodiagnostic studies might shed some light on how much of this gentleman's pain is coming from his neck versus his shoulder. He has had injections already and I do not recommend further injections or further therapy. He has had extensive physical therapy....

It would be my opinion that based on this gentleman's shoulder injury that he should have

reached maximum medical improvement within 8 to 12 weeks postsurgery on the right shoulder. At that point he should have been at maximum medical improvement....

Respondents' Exhibit Two indicates that temporary total disability was paid to the claimant through September 12, 2005. The parties stipulated at hearing that temporary total disability was paid until September 6, 2005 for the period ending September 12, 2005. The claimant testified that he had not received any benefits after temporary total disability compensation was ceased. The claimant testified that he did not receive any benefits for an impairment rating.

Dr. Covey wrote to the claimant's attorney on February 14, 2006:

I am in receipt of your February 8, 2006 letter in reference to my patient, Mr. Boone. In that correspondence you enclosed a form with simple checkboxes to help with the dispute you alude (sic) to over whether Mr. Boone's healing period has ended. I felt that this case is complex enough to warrant a more detailed discussion.

I am aware of the definition of "healing period". I am also aware of the Courts sensible decision that long-term, stable pain management for chronic residual pain from and (sic) injury is outside of the healing period. The problem is that many conditions have exacerbations of an underlying problem that essentially restarts the healing period again.

Mr. Boone has two separate issues. One is the right shoulder injury that is out of the healing period. The other is the injury to the nerves of the right upper extremity that periodically flare up. To complicate matters, he had preexisting degenerative changes of the cervical spine at the time he was injured.

I believe Dr. Baskin's and Dr. Bryant's reports are both sensible and correct up to a point. I only received the first 3 pages of Dr. Schlesinger's report. I did notice a restatement of Dr. Schlesinger's opinion by Dr. Bryant and I certainly agree with Dr. Schlesinger that Mr. Boone is not a candidate for a neurosurgical procedure. However, I was amused the (sic) he also gave an opinion on indications for a spinal cord stimulator and an implanted pump. That is somewhat akin to a cardio-thoracic surgeon commenting on cardiology interventions that he has never performed.

I have just completed a treatment of Mr. Boone for a flareup of RUE radiculitis. He is starting to have side effects to the simple medications used for this. He is quite likely back again to baseline pain management. I will have to agree when he is back to baseline that he is back in the post healing period state.

I have cared for a number of these patients who both have periodic flareups and also have controversy over the degree of injury caused by an accident. I recommend settlement of the case with provisions in the settlement for insurance coverage of the flareups.

A pre-hearing order was filed on March 13, 2006. The claimant contended that he was "still in his healing period for his cervical spine injury, as well as his shoulder injury and contends that even if it is found that he has

reached the end of his healing period, that appropriate impairment ratings have not been paid for his cervical injury, his shoulder injury or his lumbar injury. Claimant contends TTD benefits were ceased some time in late September or early October of 2005, and that he is entitled to reinstatement of TTD benefits from the time they were ceased and continuing to a date yet to be determined." The respondents contended that the claimant had "reached the end of his healing period and is therefore not entitled to any further TTD benefits. Respondents further contend that an 8% impairment rating for the lumbar injury has been paid."

The parties agreed to litigate the following issues: "Whether the claimant has reached the end of his healing period for his cervical spine and shoulder injuries, and if he has reached the end of his healing period, whether the appropriate impairment ratings have been paid. Another possible issue is claimant's entitlement to additional medical treatment, that being physical therapy."

An administrative law judge filed an opinion on November 13, 2006. The ALJ found, in pertinent part:

4. The preponderance of the evidence demonstrates that the claimant is not entitled to temporary total disability benefits or medical benefits in

connection with his compensable right shoulder injury subsequent to May 23, 2003.

5. The preponderance of the evidence demonstrates that the claimant reached the end of his healing period in connection with the compensable neck injury on January 12, 2005.

6. The preponderance of the evidence demonstrates that the claimant is entitled to the payment of temporary total disability benefits through April 9, 2004, in connection with the compensable neck injury.

7. The preponderance of the evidence demonstrates that the claimant is entitled to payment of permanent partial disability benefits at a 4% impairment to the cervical spine and an 11% impairment as a result of the injury to the shoulder and subsequent surgery resulting in a 7% whole person permanent partial impairment in accordance with the AMA Guides, 4th Edition.

8. That Respondents are entitled to a credit for payment of all TTD benefits paid between April 9, 2004, and September 12, 2004, against any unpaid permanent partial impairment benefits.

9. The preponderance of the evidence demonstrates that the claimant is entitled to reasonable and necessary medical treatment for his cervical spine injury as recommended by his authorized physician, Dr. Covey, i.e., the rental and trial use of a home IFC stimulator.

10. Respondents have controverted claimant's entitlement to additional medical benefits, temporary total disability benefits from March 23, 2002 until April 9, 2004, and unpaid permanent partial disability benefits.

The claimant appeals to the Full Commission. (The respondents do not appeal the administrative law judge's award of an IFC stimulator as recommended by Dr. Covey.)

II. ADJUDICATION

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). "Healing period" means "that period for healing of an injury resulting from an accident." Whether or not a claimant's healing period has ended is a question of fact for the Commission. *K II Constr. Co. v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002).

In the present matter, the Full Commission affirms the administrative law judge's finding that the claimant did not prove he was entitled to additional temporary total disability compensation for his right shoulder injury. The parties stipulated that the claimant sustained a compensable shoulder injury on June 21, 2001. The claimant underwent shoulder surgery and was found by Dr. Pearce to be at maximum medical improvement as of May 23, 2002. An administrative law judge subsequently found that the claimant was no longer in a healing period for his shoulder as of May 2002. The claimant did not appeal this finding and there is no evidence before the Commission demonstrating that the claimant ever re-entered a healing period for his

shoulder. The claimant did not prove that he was entitled to temporary total disability benefits for his right shoulder after May 2002.

An administrative law judge found that the claimant sustained a compensable neck injury on June 21, 2001. On April 9, 2004, Dr. Schlesinger opined that the claimant had sustained "a soft tissue aggravation of his cervical degenerative findings." Dr. Schlesinger opined that the claimant had "reached maximum medical improvement for the neck." The claimant argues that the healing period for his neck should extend until February 14, 2006, based on a letter from the pain manager, Dr. Covey. Yet we again note that Dr. Schlesinger assigned a permanent anatomical impairment rating for the claimant's neck on April 9, 2004. "Permanent impairment" has been defined as any permanent functional or anatomical loss remaining after the healing period has ended. *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994). Temporary total disability benefits cannot be awarded after a claimant's healing period has ended. *Elk Roofing Co. v. Pinson*, 22 Ark. App. 191, 737 S.W.2d 661 (1987).

The preponderance of evidence before the Commission does not demonstrate that the claimant remained within a healing period after Dr. Schlesinger's finding of maximum medical improvement and assessment of permanent anatomical impairment on April 9, 2004. Further, it is within the Commission's province to weigh all of the medical evidence and to determine what is most credible. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). In the present matter, the Full Commission finds that Dr. Schlesinger's opinion is entitled to more weight than Dr. Covey's opinion. We find that the claimant reached the end of the healing period for his neck no later than April 9, 2004.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant did not prove he was entitled to temporary total disability compensation after April 9, 2004. We note that the respondents actually paid temporary total disability to the claimant for the period ending September 12, 2005. The respondents are therefore entitled to a credit for their overpayment of temporary total disability. The administrative law judge found that the claimant was "entitled to payment of permanent partial

disability benefits at a 4% impairment to the cervical spine and an 11% impairment as a result of the injury to the shoulder and subsequent surgery resulting in a 7% anatomical impairment in accordance with the AMA Guides, 4th Edition." Neither party appeals the administrative law judge's finding with regard to permanent impairment.

The Full Commission therefore affirms the opinion of the administrative law judge. The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. McKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority's decision finding that the claimant reached the end of his healing period on April 9, 2004 in connection with the compensable neck injury; that the

claimant is entitled to temporary total disability benefits only through April 9, 2004, in connection with the compensable neck injury; and that respondents are entitled to a credit for payment of all TTD benefits paid between April 9, 2004 and September 12, 2004, against any unpaid permanent partial impairment benefits. Based upon a de novo review of the record in its entirety, I find the claimant did not reach the end of his healing period until February 14, 2006, and therefore, the claimant is entitled to temporary total disability benefits through February 14, 2006. As such, I must respectfully dissent.

The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The healing period has not ended so long as treatment is administered for the healing and alleviation of the condition. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981); J.A. Riggs Tractor Co. v. Etkorn, 30 Ark. App. 200, 785 S.W.2d 51 (1990); See

Poulan Weed Eater v. Marshall, 79 Ark. App. 129, 84 S.W.3d 878 (2002). It is evident that Dr. Covey's treatment was not only reasonable and necessary to treat the compensable injury, but that the claimant had also not exited his healing period, as he was still having noted flare-ups and being prescribed pain killers and muscle relaxers. Furthermore, Dr. Covey recommended more physical therapy to get him back to a baseline.

The Administrative Law Judge found that the claimant's healing period for his cervical injury ended on January 12, 2005. The Majority found that the claimant's healing period for his cervical injury ended on April 9, 2004. However, it is evident from the claimant's medical records, that his healing period for his cervical injury had not ended. First, Dr. Covey was the claimant's treating physician. At the first hearing on the matter, Judge Curdie gave Dr. Covey's opinion "great weight" and it should therefore be given great weight now.

Second, the claimant was being actively treated by Dr. Covey. The claimant testified that he continued to have pain in his neck and back, and that he

had not obtained a release by a treating physician for his neck injury. The claimant began treating with Dr. Carl Covey in November of 2002. Dr. Covey treated the claimant for his neck injury and pain associated with it. On November 6, 2002, Dr. Covey noted that the MRI revealed that the claimant suffered a narrowing of C5-C6 and C6-C7. Dr. Covey opined that the claimant's injury was related to the accident as evidenced by the fact that he was asymptomatic before the injury.

The Majority erred in finding that the claimant is only entitled to temporary total disability benefits through April 9, 2004, in connection with the compensable cervical injury. On February 14, 2006, Dr. Covey opined that the claimant was not yet back to baseline, and he prescribed additional physical therapy, pain killers, and a muscle relaxer. This is evidence that the claimant was not yet out of his healing period and entitled to temporary total disability through a date yet to be determined.

In a letter dated February 14, 2006, Dr. Covey opined that the claimant is not yet out of his healing period for the cervical spine injury, although he is out

of his healing period for the right shoulder injury. Dr. Covey noted that the injury to the nerves of the claimant's right upper extremity periodically flare up. Dr. Covey treated the claimant with a pain killer, Darvocet, and a muscle relaxer, Skelaxin. Additionally, Dr. Covey noted that he had just treated the claimant for a flare-up of right upper extremity (RUE) radiculitis, and that the claimant is starting to have side effects to simple medications used for this. This is evidence that the claimant was not yet stabilized. Dr. Covey opined that the claimant is quite likely back to baseline pain management, and that when the claimant is back to baseline, that he is back in the post healing period state.

It is therefore evident that the claimant was being treated not only to reduce or alleviate symptoms resulting from the compensable injury, but to also maintain the level of healing achieved, and to prevent further deterioration of the damage produced by the compensable injury. The claimant's cervical spine was treated mainly with physical therapy and narcotics for some time. In fact, as late as February 14, 2006, Dr.

Covey noted flare-ups, evidence of instability, and prescribed pain killers and muscle relaxers.

To further alleviate symptoms resulting from the injury, Dr. Covey performed a procedure for a trial spinal cord stimulator on January 11, 2005. Prior to the respondents approving the stimulator procedure, it was required that the claimant undergo a psychological evaluation. A psychological evaluation was performed May 4, 2004 by Dr. Lewis Bracy. Follow up treatment was performed by Dr. Jody Hagen between June 20 and August 5, 2004. This treatment was authorized by the respondent and had to be completed prior to the stimulator attempt.

The stimulator procedure was finally authorized and performed January 11, 2005. It was the intended purpose of Dr. Covey that the claimant would try out the stimulator for one week, and then it would be reassessed as to whether the stimulator provided the claimant with some relief. However, the claimant suffered an adverse reaction to the stimulator, and it was removed the next day, January 12, 2005. The claimant continued taking Darvocet for his pain associated with his neck injury. It is therefore evident that the

claimant's healing period did not end on January 12, 2005, as the claimant was still being treated by Dr. Convey.

In fact, Dr. Covey began administering cervical epidural injections that would total three injections. On January 10, 2006, Dr. Covey administered the first cervical epidural injection. On February 14, 2006, Dr. Covey administered the second cervical epidural injection. The claimant did not receive the third cervical epidural injection, due to the fact that he experienced blurred vision after the second injection. The injections did, however, help with some of the claimant's neck pain.

The Majority finds that the claimant's healing period ended on April 9, 2004. This is absurd as the claimant continued receiving treatment for the underlying condition for well over a two years after the respondents obtained the Independent Medical Evaluation from Dr. Schlesinger. Not only did the claimant undergo an epidural steroid injection after April 9, 2004, but he also received a stimulator. In order to even receive treatment via a stimulator, the claimant had to undergo

an extensive psychological evaluation. A psychological evaluation was performed May 4, 2004 by Dr. Lewis Bracy. Follow up treatment was performed by Dr. Jody Hagen between June 20 and August 5, 2004. This treatment was authorized by the respondent and had to be completed prior to the stimulator attempt. As such, the claimant should not be punished due to the fact that the respondents required an extensive psychological evaluation prior to authorize the treatment. Additionally, the claimant should not be punished for the respondents taking so long to approve such measures. It is therefore evident that the claimant's healing period did not end on April 9, 2004.

Furthermore, the Majority specifically states, "The respondents do not appeal the administrative law judge's award of an IFC stimulator as recommended by Dr. Covey." The respondents approved further medical treatment in the form of an IFC stimulator after they had sent the claimant for two Independent Medical Evaluations, one of which placed the claimant at MMI. However, the respondents paid for a psychological evaluation, an IFC stimulator, and additional medical

after April 9, 2004. Had the respondents actually believed that the claimant was at MMI on April 9, 2004, the respondents most likely would not have approved the IFC stimulator. As such, it is evident that the Majority clearly errs in finding that the claimant's healing period ended on April 9, 2004.

Furthermore, the Majority has based the finding that the claimant's healing period ended on April 9, 2004, on Dr. Schlesinger's medical records. The respondents sent the claimant for an Independent Medical Evaluation to Dr. Scott M. Schlesinger on April 9, 2004. Dr. Schlesinger noted that the claimant has not had a change of symptoms since the 2002 MRI, which revealed degenerative changes. Dr. Schlesinger noted that the MRI revealed a right-sided disk bulge and osteophyte formation of the C4-5 level, but that there was no neural compression associated with this. Additionally, there was no neural compression at the C5-6 and C6-7 level. Specifically, Dr. Schlesinger noted that the radiologist read out bulging disks at these levels with some neuroforaminal involvement of a mild nature, but that he did not really think that there was any

involvement of the nerves. It does not appear that Dr. Schlesinger gave this opinion with a reasonable degree of medical certainty.

Dr. Schlesinger found that the claimant's neck and back pain were multi-factoral. Specifically Dr. Schlesinger noted that as the claimant had no neck or back pain prior to the injury, it sounds like the claimant had a soft tissue aggravation of his degenerative findings and that the lumbar findings were strictly musculoskeletal. Furthermore, Dr. Schlesinger stated:

I would state with a high degree of medical certainty that no further interventions are indicated. I do not feel that any form of surgery, be it a spinal stimulator, pain pump, or any form of operation, would be of any benefit to this patient's neck or back.

Contrary to the Majority's finding, Dr. Schlesinger's opinion should not be afforded as much weight as Dr. Covey's opinion. First, Judge Curdie had already named Dr. Covey as the treating physician for the cervical problem. Second, Dr. Schlesinger saw the claimant one time. Dr. Covey had been treating the claimant's cervical injury for several years. No one was

more familiar with the claimant's injury than Dr. Covey. Third, Dr. Schlesinger is a neurosurgeon, trained to perform surgery and not to look at a problem for conservative treatment. This is apparent from his recommendations. Dr. Schlesinger did not recommend that the claimant under-go surgery. Dr. Covey agreed with this assessment. However, Dr. Schlesinger also recommended that the claimant not undergo a spinal stimulator or pain pump. Dr. Covey, a pain specialist, pointed out that Dr. Schlesinger's opinion was akin to a cardio-thoracic surgeon commenting on cardiology interventions that he has never performed. It is apparent that Dr. Schlesinger is grossly unqualified to specify treatment for pain, when in fact a pain specialist has been working with the claimant. It is therefore obvious that the claimant's healing period for his cervical injury did not end on April 9, 2004.

The respondents also cite Dr. Baskin's Independent Medical Evaluation to bolster Dr. Schlesinger's opinion that the claimant's healing period ended on April 9, 2004. However, Dr. Baskin never opined that the claimant's healing period ended on April 9,

2004. Interestingly enough, Dr. Baskin commented that an EMG was never performed, and that it might shed some light on how much of the claimant's pain came from his neck versus his shoulder. In my opinion, this shows that Dr. Baskin believed that there was possibly a treatment that might improve the claimant's condition.

Furthermore, Dr. Baskin noted that based upon the claimant's shoulder injury, that he "should have" reached maximum medical improvement within 8 to 12 weeks post surgery on the right shoulder, but never commented as to whether the claimant's healing period for his cervical injury had ended. Dr. Baskin only speculates as to when the claimant's healing period should have ended. Dr. Baskin did not opine when or if the healing period actually ended. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). Therefore, Dr. Baskin's opinion does not bolster Dr. Schlesinger's opinion or state that the claimant had ended his healing

period for his cervical injury. As such, Dr. Baskin's opinion carried very little weight.

Not only was the treatment provided by Dr. Covey reasonable and necessary, as Judge Curdie originally found, but it is evident that the claimant's healing period for his cervical injury was not April 9, 2004. Rather, Dr. Covey was still treating the claimant with treatment geared toward management of the claimant's compensable injury. As the claimant's healing period for his cervical injury did not end, the claimant is entitled to temporary total disability benefits through a date yet to be determined.

I find that the claimant had not exited his healing period for the cervical injury. As such, the claimant is entitled to ongoing treatment and temporary total disability in connection with this compensable injury. Furthermore, I find that as the healing period has not ended, the respondents are not entitled to a credit. As such, I respectfully dissent.

PHILIP A. HOOD, Commissioner