

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF PENNSYLVANIA**

<b>JOHN R. SOPP,</b>	:	
		<b>CIVIL ACTION NO. 3:01-2217</b>
<b>Plaintiff</b>	:	
<b>v.</b>		<b>(MANNION, M.J.)</b>
<b>CNA INSURANCE</b>	:	
<b>COMPANY (CONTINENTAL</b>	:	
<b>CASUALTY COMPANY) and</b>	:	
<b>KRAFT FOODS, INC.,</b>	:	
<b>Defendants</b>	:	

**MEMORANDUM AND ORDER**

Before the court are the plaintiff's and defendants' cross-motions for summary judgment filed pursuant to Fed.R.Civ.P. 56(c). (Doc. Nos. 19, 27).

**I. PROCEDURAL HISTORY**

On November 20, 2001, the defendant CNA Insurance Company (Continental Casualty Company)(collectively referred to as "CCC"), and Kraft Foods, Inc., ("Kraft"), filed a petition for removal seeking to remove this matter from the Luzerne County Court of Common Pleas. (Doc. No. 1). The plaintiff ("Sopp") had filed a complaint in that court seeking reinstatement of Short Term Disability benefits, and a determination as to his entitlement to Long-Term Disability benefits under the CCC/Kraft Disability Insurance Plan, an employee welfare benefit plan regulated by the Employee Retirement Income Security Act of 1974, ("ERISA"), as amended, 29 U.S.C. §§ 1001-1461. (Doc.

No. 1).

After being granted an extension of time to do so, the plaintiff filed an amended complaint on March 4, 2002. (Doc. No. 7). The defendants filed an answer to the amended complaint on May 5, 2002. The parties consented on July 3, 2002, to proceed before the undersigned United States Magistrate Judge. (Doc. Nos. 11, 12). The defendants filed a motion for summary judgment, a supporting brief with exhibits, and proposed findings of fact, on August 18, 2003. (Doc. Nos. 19, 20, 21). After being granted an extension of time to do so, the plaintiff filed a cross-motion for summary judgment, proposed findings of fact, and a brief in opposition to the defendants' motion for summary judgment, with exhibits, on November 4, 2003. (Doc. Nos. 27, 28). The defendants filed a reply to the plaintiff's cross-motion for summary judgment on November 25, 2003, and a brief in opposition, on December 8, 2003. (Doc. Nos. 34, 37). Because certain clarifications of the record were necessary for resolution of this matter, oral argument was held on May 6, 2004, to address those issues.

## **II. FACTUAL BACKGROUND**

The documents submitted by the parties establish that Mr. Sopp was involved in a motor vehicle accident on May 5, 1999, which occurred while he was in the scope of his employment with co-defendant Kraft Foods. He sustained a number of injuries as a result of the motor vehicle accident,

mostly to his left upper extremity, which are discussed in more detail below. He applied for and received short term disability benefits through August 31, 1999.

On September 2, 1999, following receipt of an Independent Medical Examination report, CCC advised Mr. Sopp that he had been released to return to his duties as of August 31, 1999. He was advised that his short term disability benefits would be discontinued as of that date. (Doc. No. 18, defendants' record in support of the motion for summary judgment; CCC 322).<sup>1</sup>

The plaintiff filed an appeal of the determination on November 11, 1999. (CCC 145). On July 6, 2000, CCC's Disability Specialist Joanne Laurie wrote to the plaintiff's attorney and advised him that a review had been completed of Mr. Sopp's disability claim, and that it was determined that the medical records, on the whole, did not support a claim for on-going disability benefits. Specifically, Ms. Laurie discussed and described the plaintiff's job duties, and concluded that there was nothing in the plaintiff's medical records which would preclude him from performing the regular duties of his job as a Customer Category Manager. (CCC 138). The plaintiff made several

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<sup>1</sup> Both plaintiff and defendants submitted records in support of their motions for summary judgment. The records contain largely the same documents, however, they are not identical and are paginated differently. For the sake of clarity, the record will be cited using the defendants' identifier "CCC" whenever possible.

subsequent attempts to again appeal the decision, usually incorporating ongoing treatment records. The plaintiff subsequently filed a complaint in the Luzerne County Court of Common Pleas seeking a determination as to his rights under the Kraft short term and long term disability plans. As noted above, that matter was removed to this court. (Doc. No. 1).

### **III. ERISA STANDARD OF REVIEW**

A denial of benefits challenged under Section 1132(a)(1)(B) of ERISA is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989). If the plan vests such discretion in the plan administrator, the decision is to be reviewed under the more deferential arbitrary and capricious standard of review. Id.; See also Luby v. Teamsters Health, Welfare and Pension Trust Funds, 944 F.2d 1176, 1180 (3d Cir. 1991); Heasley v. Belden & Blake Corp., 2 F.3d 1249, 1256 (3d Cir. 1993).

The arbitrary and capricious standard is essentially the same as the “abuse of discretion” standard. Abnathya v. Hoffman-La Roche, 2 F.3d 40, 45 (3d Cir. 1993). The scope of review is narrow and the court is not free to substitute its own judgment for that of the plan administrator in determining eligibility for plan benefits. Id. at 45.

Kraft’s Plan explicitly confers this discretion on the plan administrator.

The plan provides, in pertinent part:

...When making a benefit determination under the policy, We have discretionary authority to determine *Your* eligibility for benefits and to interpret the terms and provisions of the policy...

...The plan administrator has complete discretionary authority to determine eligibility for benefits and to construe uncertain plan terms...

...The Administrator and other Plan fiduciaries have discretionary authority to interpret the terms of the Plan and to determine eligibility for and entitlement to benefits in accordance with the Plan...

(Doc. No. 18, Kraft Choice Summary Plan Descriptions, pp. 7, 11, 20)(emphasis in original). Because this language clearly gives the plan administrator discretion over the payment of benefits, the arbitrary and capricious standard of Firestone is applicable in this case.

Furthermore, under the arbitrary and capricious standard, the district court is to “look to the record as a whole,” which “consists of evidence that was before the administrator when he or she made the decision being reviewed.” Mitchell v. Eastman Kodak Co., 113 F.3d 433, 440 (3d Cir. 1997)(emphasis added). The relevant administrative record has been defined as including the evidence not only before the administrator at the time of the original decision in the matter, but also any additional records which may have been submitted and reviewed in the process of any administrative appeal. Ernest v. Plan Administrator of the Textron Insured Benefits Plan, 124 F.

Supp.2d 884, 893 (M.D.Pa. 2000). Therefore, the relevant administrative record in this matter is limited solely to the period beginning May 5, 1999, the date of the motor vehicle accident, and the date of CCC's final decision relating to the termination of short term disability benefits as of August 31, 1999. Thus, any supplemental records, reports, or any other documents produced by the parties during the course of this litigation are not admissible as a matter of law, and cannot be considered by this court.

One of the questions addressed at oral argument on May 6, 2004, concerned the actual date of CCC's final decision. It was the understanding of the court at the conclusion of the oral argument that the parties would discuss this matter, perhaps come to a stipulation regarding the date, and then so advise the court. This did not happen. Therefore, based upon the records before the court, the court has determined that July 6, 2000, is the date that the decision became final. The record shows that the plaintiff's attorney continued to submit medical records thereafter to both CCC and Kraft, but those records did not affect the final decision of July 6, 2000, to affirm the termination of short term disability benefits as of August 30, 1999.

#### **IV. DISCUSSION**

The parties have filed cross-motions for summary judgment pursuant to Fed. R. Civ. P. 56(c). Summary judgment is appropriate when supporting materials, such as affidavits and other documentation, show there are no

material issues of fact to be resolved, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); See Turner v. Schering-Plough Corp., 901 F.2d 335, 340 (3d Cir. 1990). The Supreme Court has ruled that Fed. R. Civ. P. 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp v. Catrett, 477 U.S. 317 (1986). The Court further stated that "Rule 56(e)...requires the non-moving party to go beyond the pleadings and by [his] own affidavits, or by depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." Id. at 324; Lujan v. National Wildlife Fed'n, 497 U.S. 871, 888 (1990); Pastore v. Bell Tel. Co. of Pennsylvania, 24 F.3d 508, 511 (3d Cir. 1994) (quoting Harter v. GAF Corp., 967 F.2d 846, 852 (3d Cir. 1992)). The party moving for summary judgment bears the burden of showing the absence of a genuine issue as to any material fact. Id. at 323; Young v. Quinlan, 960 F.2d 351, 357 (3d Cir. 1992). To determine whether the non-moving party has met his or her burden, the Court must focus on both the materiality and the genuineness of the factual issues raised by the non-movant. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original). A dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Id. at 250. A disputed fact is material when it could affect the outcome of the suit under the governing substantive law. Id. at 248. If the Court determines that "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial'." Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574, 587 (1986) (quoting First Nat. Bank of Ariz. v. Cities Service Co., 391 U.S. 253, 289 (1968)). All inferences, however, "should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true'." Pastore, 24 F.3d at 512 (quoting Big Apple BMW, Inc. v. BMW of N. America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993)). With these principles in mind, the court will address the allegations in the complaint, as amended, and review the materials and documentation submitted by both parties in order to determine whether a triable issue of material fact has been established by either party.

The plaintiff has alleged that CCC/Kraft's decision to terminate his short term disability benefits, and to not approve long term benefits, was an arbitrary and capricious decision which was not supported by the medical record on the whole. He maintains that he suffers from numerous medical conditions which prevent him from performing the substantial and material



duties of his regular occupation, and that he is also unable to perform any work for wage or profit for which he is reasonably fitted by education or experience, or may reasonably become qualified through training, education, or experience. (Doc. Nos. 1, 7).

In its motion for summary judgment, CCC/Kraft maintains that although the plaintiff did sustain a number of musculoligamentous injuries as a result of the motor vehicle accident of May 5, 1999, the plaintiff had recovered sufficiently from those injuries as of August 31, 1999, so as to be able to return to his regular job duties as a Customer Category Manager. Additionally, the defendants argue that the plaintiff's claim for long term disability benefits has never become ripe for evaluation because the plan requires, as a prerequisite, that the claimant had been disabled for a period of twenty-six (26) weeks under the short term disability plan, which the defendants allege plaintiff cannot establish. In support of its motion for summary judgment the defendants have offered a number of medical records covering the period May 7, 1999, through April 20, 2000<sup>2</sup>.

The plaintiff was examined by Susan T. Depoliti Yang, M.D., on May 7, 1999, apparently upon telephone referral by the plaintiff's family physician, Dr. Blum. Dr. Yang then assumed care as his primary treating physician. She reported on May 7, 1999:

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<sup>2</sup>Although the motor vehicle accident occurred on May 5, 1999, the plaintiff was not examined by a physician until May 7, 1999.

...Mr. Sopp was involved in a motor vehicle accident on 5/5/99. [H]e was the seat belted driver of an automobile. He was driving in traffic and his brakes did not function and he was unable to stop and hit the car in front of him. The left side of Mr. Sopp's car hit the right rear of the car in front of him...

...Mr. Sopp said his head hit the visor and his ribs hit the steering wheel...

...Since the accident he has been suffering with headaches which have occurred more so on the left side of his head, which extends from the frontal region through the parietal temporal and down the occipital area...

...He also suffers with neck pain which radiates into the left shoulder, posterior arm, and ulnar forearm to the second and third digits of his left hand. He states that initially the pain was sharp pain, it then changed to an achy pain which was dull, and now he is experiencing numbness and weakness...

...He also suffers with mid back pain and left lateral rib pain...

...He is seen today for emergent evaluation.

...Rheumatologic: Left shoulder pain.

...Musculoskeletal: Neck and mid back pain. Left lateral rib pain.

...Neurological: Radiating pain down the left upper extremities described in HPI. Blurriness in his left eye since he started taking Vicodin.

Physical Examination: In General, a well developed, well nourished male, sitting upright in the chair in no acute distress.

...Neurological: Sensation was diminished to light touch and pinprick across the left shoulder as well as along the medial arm and forearm and across the medial aspect of the hand and fingers. Deep tendon reflexes were

+1 and symmetric for the biceps, triceps, brachioradialis, right and left.

...Manual muscle testing revealed the following:

	Right	Left
Shoulder abduction	5/5	5/5
Shoulder Flexion	5/5	5/5
Elbow Flexion	5/5	4/5
Elbow Extension	5/5	4/5
Wrist Flexion	5/5	4/5
Wrist Extension	5/5	4/5
Grip Strength	5/5	3/5

Musculoskeletal palpation revealed the following:

1. There were trigger points and taut spasms along the left cervical paraspinal musculature.
2. There were trigger points and taut spasm along the left trapezius and rhomboid muscles.
3. There was tenderness to palpation of the left bicipital groove.
4. There was exquisite tenderness to palpation of the left supraspinatus tendon.
5. There was no tenderness to palpation of the left lateral epicondyle.

...Cervical/upper extremity maneuvers were as follows:

1. Axial compression did not produce upper extremity pain.
2. Apley scratch test was positive on the left.
3. Hawkin's impingement was positive on the left.
4. Supraspinatus testing was positive on the left.

...Cervical mobility, although full, produced mild pain at end range of motion for flexion, extension, bilateral side bending and bilateral rotation...

...Range of motion of the left upper extremity was full both actively and passively elbow and wrist, but produced mild pain at end range of motion of the left elbow...

...Range of motion of the left shoulder was limited in all planes secondary to pain but most limited in extension and internal rotation.

Impression:

1. Musculoligamentous injury of the cervical spine, left periscapular area.
2. Musculoligamentous injury of the thoracic spine.
3. Cervicular radiculitis.
4. Rule out cervical disc herniation.
5. Rule out thoracic disc herniation.
6. Left shoulder synovitis.
7. Left supraspinatus tendonitis.
8. Left bicipital groove tendonitis.
9. Rule out internal derangement of the left shoulder.
10. Left intercostal strain, rule out left rib fracture.

(CCC 369-373).

Dr. Yang followed up with diagnostic testing. An X-ray of the cervical spine dated May 13, 1999, was read as showing mild degenerative changes of the lower cervical spine with no evidence of a recent fracture or displacement. (CCC 380). An MRI of the cervical spine also dated May 13, 1999, revealed mild degeneration and bulging of the C5-6 disc, but no evidence of disc herniation. The impression was, "[P]robably early degenerative changes [affecting] C5-6 with a bulging disc noted asymmetrically toward the right side. The remainder of the cervical spine study is within normal limits." (CCC 377). An X-ray of the thoracic spine also dated May 13, 1999, was read as showing moderate degenerative changes of the mid and lower thoracic spine. (CCC 381). An MRI of the thoracic spine

also dated May 13, 1999, revealed mild degenerative changes in the mid and lower thoracic spine, but no evidence of a herniated disc or spinal stenosis. The impression was, “[M]ild degenerative changes in the mid and lower thoracic spine as described. There is no evidence of a spinal cord or a spinal canal abnormality.” (CCC 378).

An MRI of the left shoulder also dated May 13, 1999, revealed the AC joint was enlarged and did distort the superior margin of the rotator cuff. The supraspinatus tendon was normal. There was no evidence of a full thickness tear, no bursitis or tendonitis. The impression was:

[M]ild shoulder impingement. Several linear areas of increased signal are noted in the rotator cuff in the subacromial region. These may be partial tears or inflammatory changes secondary to the mild shoulder impingement. There is no evidence of a full thickness tear and there is no retraction of the rotator cuff demonstrated. The glenoid labrum is intact. (CCC 379).

Based partially upon the results of these tests, CCC Disability Specialist Laurie determined that short term disability benefits should begin, but that the claim should be further investigated. (CCC 319). It was also noted that a workers’ compensation claim had been opened and approved by Kemper National Services, Kraft’s workers’ compensation insurance carrier and administrator. (CCC 318). On occasion benefits were “pended,” due to the plaintiff’s refusal to attend functional capacity evaluations or independent medical examinations. (CCC 336).

The plaintiff next saw Dr. Yang on May 24, 1999. He was complaining

of headaches more on the left side than the right side of his head. He was also complaining of neck pain radiating down into the left shoulder, left posterior arm, and left ulnar forearm to the second and third digits of his left hand. The plaintiff described the pain as an “achy/dull” pain with associated numbness and weakness in the left upper extremity. He also complained of mid back pain. (CCC 374). Dr. Yang’s neurological exam revealed “diminished sensation to light touch and pin prick across the left shoulder as well as along the medial arm and forearm into the 3<sup>d</sup> through 5<sup>th</sup> digits of the left hand.” Dr. Yang’s plan was to obtain EMG studies, institute physical therapy and chiropractic treatment, and consider possible cervical epidural blocks. She also stated that she anticipated that the plaintiff would “remain off of work for approximately four weeks” until his conservative therapy had been completed. (CCC 376).

The EMG studies were completed on June 11, 1999, by Tuan Nguyen, M.D. He concluded that the studies were normal. His impressions were:

1. There is no electrophysiological evidence of median, ulnar neuropathy.
2. There is no electrophysiological evidence of a cervical radiculopathy.
3. There is no electrophysiological evidence of a polyneuropathy or plexopathy. Clinical correlation is advised.

(CCC 50-51).

Dr. Yang referred the plaintiff to the University of Pennsylvania,

Department of Rehabilitation, where he was treated by Curtis W. Slipman, M.D., and Rajeev Patel, M.D. Dr. Patel did the initial evaluation of the plaintiff on July 12, 1999. He noted, among other things, that the plaintiff was receiving chiropractic treatments which provided limited relief of approximately twelve (12) hours. His physical examination results indicated “Neck pain with radiation into the scapula and into the left upper extremity, possibly secondary to discogenic pain etiology with scleromal<sup>3</sup> referral pattern; Rule out cervical facet syndrome; Rule out less likely cervical radiculopathy.” The plan was that the plaintiff should undergo a left-sided C-7 therapeutic transforaminal epidural space installation, and if after two injections there was no improvement, then a series of diagnostic zygapophyseal joint injections should be done at levels C1-2, C2-3, and C3-4. If these measures proved to be unfruitful, the plan was that the plaintiff should be scheduled for a discogram of C4-5 and C5-6, in an attempt to locate the underlying pain generation, and to determine whether the plaintiff would be a candidate for a possible fusion. (CCC 346). The plaintiff had two injections into his facet joints and his cervical spine, both of which were unsuccessful in offering him any lasting relief. (CCC 209).

As indicated above, the plaintiff was approved on August 21, 1999, for

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<sup>3</sup>Scleromal: “Indurated, circumscribed area of granulation tissue in the mucous membrane or skin.” Taber’s Cyclopedic Medical Dictionary at 1853 (19<sup>th</sup> ed. 2001).

workers' compensation benefits by Kemper, Kraft's workers' compensation insurance carrier. (CCC 404). Kemper arranged for an Independent Medical Examination which was performed by Robert T. O'Leary, D.O., on August 30, 1999. Because CCC's termination of the short term disability claim is based in large part upon Dr. O'Leary's opinions, the report follows in some detail.

Dr. O'Leary stated, in pertinent part:

### **MUSCULOSKELETAL**

**Range of motion:** Range of motion of the examinee's C-spine was decreased on left side bending and rotation to perhaps  $\frac{1}{2}$  of normal of what he was able to perform toward the right, which was normal. Any extension caused the examinee to stop to avoid any pain. Range of motion for the upper extremities found him to complain of pain on internal rotation of his left shoulder. Full external rotation. Full abduction. There was no sign of any impingement in his left shoulder.

**Palpation:** On palpation, the examinee complained of tenderness along his cervical paravertebral musculature into the thoracic spine to T9. He also complained of tenderness in his shoulder girdle region generally along his left chest lateral to his sternum into the mid axillary line mainly. I was unable to palpate any crepitus, any spasm, or trigger points objectively.

### **NEUROLOGICAL**

**Motor Strength:** Motor strength was 5/5 right shoulder, elbow, wrist, and grip. 4/5 left shoulder, elbow, wrist, and grip with cogwheeling.

**Reflexes:** DTRs were 2/4 biceps, triceps, brachioradialis, and symmetric.

**Sensory:** Sensation intact to light touch and sharp sense in all dermatomes of the upper extremities, though decreased in a non-dermatomal distribution in the medial and lateral forearm into his hand about his thenar eminence at the thumb and his



hypothenar eminence and pinky on the left. He additionally claimed of numbness along his left side from the thoracic spine T7 through T9, around into his chest to sharp sense asymmetric to the right.

**Clinical Diagnostic Tests:** Impingement sign on the left shoulder was negative. Spurling's sign was absent. His Hofmann's sign was absent bilaterally. Yergason's sign was negative bilaterally. Tinel's and Phalen's at the wrists and Tinel's at the elbows were negative.

### **IMPRESSION**

1. Myoligamentous sprain/strain, left shoulder and cervical spine.
2. Degenerative changes, cervical spine and left shoulder, pre-existing.
3. Complaints of pain into the left rib intercoastal region, T7 through T9.

### **DISCUSSION**

...The examinee has had two injections into his facet joints and the cervical spine, both of which were unsuccessful in offering him any relief. Besides being potentially therapeutic, these injections are diagnostic. If he had a lot of increased inflammation in these areas, they more than likely would have decreased his complaints of pain. Since they did not, I doubt that he has facet syndrome in the cervical spine. The examinee has degenerative changes in his neck and mid back as well as his left shoulder, which predate his 05/05/99 motor vehicle accident...

...The examinee should not continue to take Vicodin, a narcotic. This is no longer necessary or appropriate. I believe the Celebrex is reasonable as a non-steroidal anti-inflammatory medication. Giving him the benefit of the doubt, I believe the examinee has a soft tissue injury to his neck and left shoulder. There is no direct evidence of a tear, though there is some inflammation. There is no evidence of tendinitis or bursitis. The examinee was rather vague when I asked him if he had previous MRIs, telling me he did not recall. This simply seemed to be out of place during our conversation today...

...In any case, the examinee has had many weeks of physical therapy on top of chiropractic manipulation, massage, and modalities. The examinee no longer requires formal physical therapy or chronic manipulation to his spine. I would recommend, if he were my patient, that he continue an independent home program with his range of motion and stretching exercises that he is certain to have learned over the past many weeks...

...I would not limit the examinee from his pre-injury duty as I understand it. I would limit him from lifting more than 35 pounds or repetitive use of his left upper extremity above shoulder region. Besides this, I would not limit him physically based on his motor vehicle accident of 05/05/99. Based on today's examination, the examinee has reached maximum medical improvement meaning specifically it is unlikely that anything done further to him or for him by way of physical therapy, chiropractic treatment, or injections are going to make any difference in his recovery...

...It is my professional opinion, with a reasonable degree of medical certainty, that he will fully and completely recover based on today's evaluation within the next 10 weeks...

(CCC 119-124). In conjunction with the report, Dr. O'Leary also prepared a Functional Capacity Evaluation ("FCE") which stated:

...The FCE results indicate that Mr. Sopp is able to function at the **LIGHT-MEDIUM** Physical Demand Level for **an 8 hour day**...

...Mr. Sopp was asked to complete a total of 14 pain questionnaires. According to these results, Mr. Sopp scored high on 50% of criteria tested indicating evidence that symptom disability/exaggeration may exist. He passed only 20/52 validity criteria during the FCE, 38% of which suggest a very poor voluntary submaximal effort, which is not necessarily related to his pain, impairment, or disability. Based on today's profile, other data must be considered to help understand Mr. Sopp's true functional ability and to assist with medical and vocational planning...

(CCC 126)(emphasis in original).

As indicated above, based partially on these findings, the plaintiff was informed on September 9, 1999, that he had been released to return to light to medium work as of August 31, 1999. (CCC 322).

The plaintiff's attorney appealed the decision by correspondence dated November 11, 1999. Ms. Laurie advised the plaintiff's attorney on November 23, 1999, that the medical evidence in the file showed that Mr. Sopp could return to work with no lifting over 35 pounds, and limited reaching or working above left shoulder level, and that his job was classified as in the sedentary to light category. She stated that she would forward the additional medical records which the plaintiff had submitted to the Appeal Committee, and that the Appeal Committee would issue a ruling within 60 days of receipt of the appeal. (CCC 224). In fact, the plaintiff's appeal was reviewed several times before it was finally denied on July 6, 2000. (CCC 8, 168, 142-143, 222-224).

The substance of the disagreement among the parties is the nature and extent of the plaintiff's residual injuries; the plaintiff's "time of injury" job description and its physical requirements, and whether the plaintiff was capable of returning to work, and performing those job requirements as of August 31, 1999.

A file note of Ms. Laurie dated May 20, 1999, indicated that she interviewed the plaintiff on that date. The plaintiff told Ms. Laurie that he had not really improved at all since the accident. The note states in pertinent part:

Has not engaged attorney yet for this accident, yet (sic).

Watches TV most of the day. Wife helps him when he needs it. No real difficulty going up steps. States he was in accident in company car. Brake failure.

Job duties require computer input also calls on an account 2 ½ [hour] drive away for 1 day p/week. Does sales at the account sells Oscar Mayer and cheeses. Most of days are spent in the office doing regular desk work. (Except when he visits this account 1 day/week.)

(CCC 405).

The defendants also submitted Kraft's Customer Category Manager official job description. The description of the ideal candidate's characteristics for such a job included, "[E]xcellent interpersonal, selling and negotiation skills; a command of business analytics including computer literacy and finance; understand the strategic and tactical aspects of merchandising programs, and the ability to combine interpersonal skills and analytic selling tools to influence customers." (CCC 158-159). The description did not mention any physical requirements of the job classification, but it did clearly establish the position as one of management.

On or about June 4, 1999, a report was generated titled "Physical Demands Analysis" which described the Customer Category Manager. The signature line bears the name Angela Mons, the plaintiff's supervisor, but it also contains the initials "JR" in a circle indicating that it was "JR" who actually signed the document. The only physical demands listed for the position were finger dexterity, twisting of the head and back, and the ability to operate a motor vehicle. (CCC 278-279).

As noted, Ms. Laurie advised the plaintiff by letter dated July 6, 2000, that his appeal had been denied, and that the original decision to terminate short term benefits as of August 31, 1999 would stand. Because this letter explains in detail the records relied upon by the defendants in affirming the original decision to terminate short term disability benefits as of August 31, 1999, it follows in some detail:

We have completed the review of Mr. Sopp's Short Term Disability claim. We have reviewed the additional medical information submitted from 1/03/00 through 1/12/00 from Worker's Compensation. These reports indicate that Mr. Sopp had continued complaints of pain in his neck and upper back. Physical therapy was recommended. These reports were unsigned, but noted at the top of the page to be from Kathleen Cohen, CRRN.

Two procedure notes for nerve blocks from Dr. Curtis Slipman, dated 9/27/99 and 9/28/99, were also included in the review. A March 6, 2000 letter from Richard Cohen D.C. noted continued treatment for pain in the neck, head, mid back, left arm and shoulder. These symptoms come and go with brief periods of relief. It is noted that certain activities exacerbate the symptoms. Dr. Yang's report of 10/5/99 indicates light tender points, a scant spasm along the left cervical paraspinal musculature as well as along the left trapezius supraspinatus and rhomboid muscles. This notes an improvement since the last visit. Dr. Yang further reports slight tenderness to palpation of the left supraspinatus tendon, no tenderness to palpation of the left bicipital groove. There is decreased strength diffusely throughout all major muscle groups of left upper extremity. He has full forward flexion, extension, bilateral side bending and bilateral rotation and produces only very mild pain at end range of motion since his most recent injection. Full left upper extremity range of motion, produces mild pain at end range of motion, secondary to left shoulder and intercostal discomfort.

We have also reviewed the information submitted in the deposition that outlines Mr. Sopp's description of his job duties of a Customer Category Manager. Mr. Sopp has advised that his

job duties entailed climbing, stooping, kneeling, crouching and handling items with both hands. He also indicates that reaching above, below and across shoulder level was required. The duties also include twisting and turning and bending at the waist level. Fumes, dust, dirt, noise, moving machinery, chemicals, sharp tools, slick floors, and changes in temperature were noted. He also indicated that he drove every other week 2 ½ hours, each way for warehouse checks. Driving included 2 ½-3 ½ hours, each way, twice a week (sic). Twice a month he would participate in building displays, moving material from the back room to the coolers and lifting as much as 72 lbs. These activities would take eight to ten hours, a full day, twice a month. The job duties also included planning meetings, dealing with price quotes, filing contracts and clerical duties.

Job requirements of a Customer Category Manager have been verified with Kraft Foods. Kraft Foods, Inc. maintains that the duties of a Customer Category Manager are 1) to sell Kraft and Oscar Meyer products, 2) review and analyze category trends and provide information to accounts, and 3) develop fact-based customer presentations. In order to perform these functions, Mr. Sopp would use a computer, telephone and calculator. Kraft also indicates that Mr. Sopp's job duties as a Customer Category Manager did require long, constant driving and the physical demands of job site set ups. Kraft Foods, Inc. further maintains that the duties that Mr. Sopp has described in his deposition are those of a Merchandiser, not a Customer Category Manager.

We are unable to approve additional benefits under the above Short Term Disability Plan and Mr. Sopp's claim remains closed...

(CCC 138-139).

In response to the defendants' motion for summary judgment, and in support of his own motion for summary judgment, the plaintiff maintains that defendants' decision to terminate the plaintiff's benefits was "arbitrarily and capriciously made by the Defendants and was based solely upon a company policy of the Defendants to deny all claims to save money and coerce

favorable lump settlements to remove claimants from the books.” (Doc. No. 27, ¶ 13). The plaintiff also claims that the defendants’ classification of the Customer Category Manager’s job duties as sedentary to light is not supported by the evidence of record, and is more appropriately classified as medium to heavy work.

Also in response to the defendants’ motion for summary judgment, and in support of his own motion for summary judgment, the plaintiff offered medical reports and records from Drs. Slipman and Patel, Richard Cohen, D.C., and the workers’ compensation testimony of Angela Mons, who was his supervisor at Kraft. Ms. Mons testified to what her understanding of the plaintiff’s job duties entailed.

The plaintiff also submitted two reports which were also generated in the course of the workers’ compensation proceedings. A report dated January 24, 2000, prepared by Carl R. Goodman, M.D. which opined that the medical treatment provided by Dr. Yang had been reasonable and necessary. Another report was prepared by Paul F. LaMay, D.C., who opined that the chiropractic care provided by Richard Cohen, D.C. was also reasonable and necessary. (CCC 172).

The plaintiff also attempted to submit medical records and the deposition testimony of Albert Janerich, M.D., his subsequent treating physician, which was also taken in the course of the workers’ compensation proceedings. These documents from Dr. Janerich were not considered as

there is no indication that the defendants ever saw or utilized them in it's decision to terminate the short term disability benefits.

The plaintiff argues that all of these records establish that he sustained far more serious and permanent injuries than as interpreted by the plan administrator, and also that the record does not support the conclusion that his work as a Customer Category Manager was sedentary to light in nature. Therefore, he maintains that the decision to terminate benefits as of August 31, 1999, was arbitrary and capricious, and summary judgment should be granted in his favor.

All of the medical records submitted by both parties have been carefully reviewed, as well as the plaintiff's deposition testimony, and that of Angela Mons. While it is certain that the plaintiff did sustain injuries as a result of the motor vehicle accident of May 5, 1999, the record on the whole cannot support a finding that those injuries remained so debilitating as to prevent the plaintiff from performing his time-of-injury job as a Customer Category Manager as of August 31, 1999. There is no indication from any doctor after August 31, 1999, that the plaintiff was completely disabled. In fact, the impression of Dr. Yang, who was the first physician to examine the plaintiff after the accident, was that the plaintiff would probably be able to return to work after a matter of four weeks. Furthermore, none of the diagnostic tests revealed any objective evidence which could explain the plaintiff's continued complaints.



Finally, the plaintiff has put forth no evidence whatsoever to support his allegation that the decision to terminate the plaintiff's benefits was based solely upon a company policy to deny all claims to save money and coerce favorable lump settlements to remove claimants from the books.

As indicated above, the burden of proof remains with the claimant to establish total disability. Mitchell, 113 F.3d at 439. This court is not free to substitute its own judgment for that of the plan administrator in determining eligibility for plan benefits, and may reverse the administrator's decision only if it was arbitrary and capricious. Abnathya, 2 F.3d at 45. The record on the whole establishes that the decision to terminate short term disability benefits as of August 31, 1999, and to not approve long term disability benefits, was not arbitrary and capricious. . Thus, summary judgment in favor of the defendants is warranted. Conversely, the plaintiff has failed to show there is a genuine issue of material fact that requires resolution by trial, nor that he is entitled to Summary Judgment as a matter of Law.

## **V. CONCLUSION**

For the foregoing reasons, **IT IS ORDERED THAT:**

- (1) The defendants' motion for summary judgment (Doc. No. 19) is **GRANTED**, and the matter is dismissed; and

- (2) The plaintiff's counter-motion for summary judgment (Doc. No. 27) is **DENIED**.
- (3) The Trial scheduled for August 16, 2004 is cancelled and the Clerk is to mark this case closed.

s/ Malachy E. Mannion

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**MALACHY E. MANNION**  
**United States Magistrate Judge**

Dated: June 23, 2004

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